

1-17-2013

# Teurlings v. Larson Clerk's Record v. 1 Dckt. 40502

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In the  
**SUPREME COURT**  
of the  
**STATE OF IDAHO**

WILLIAM P. TEURLINGS,

Petitioner-Appellant,

v.

MALLORY E. LARSON nka MALLORY E. MARTINEZ,

Defendant-Respondent.

Appealed from the District Court of the Second  
Judicial District of the State of Idaho, in and  
for Clearwater County

Honorable CARL B. KERRICK, District Judge

Ned A. Cannon  
Attorney for Petitioner-Appellant  
Sonyalee R. Nutsch  
Attorney for Defendant-Respondent

William P Teurlings vs. Mallory E Larson

Date	Code	User		Judge
1/6/2009	COMP	BARBIE	Complaint Filed	Carl B. Kerrick
1/7/2009	SMIS	BARBIE	Summons Issued	Carl B. Kerrick
6/9/2009	NOTC	BARBIE	Notice of Workers' Compensation Lien	Carl B. Kerrick
7/27/2009	ANSW	BARBIE	Answer and Demand for Jury Trial	Carl B. Kerrick
	MOTN	BARBIE	Motion for Change of Venue to Clearwater County	Carl B. Kerrick
7/30/2009	AFSR	BARBIE	Affidavit Of Service	Carl B. Kerrick
8/5/2009	RESO	BARBIE	Defendant's Response in Opposition of Swift Transportation's Workers' Compensation Lien	Carl B. Kerrick
8/12/2009	MOTN	BARBIE	Defendant's Motion to Strike Swift Transportation's Workers' Compensation Lien and Motion for Sanctions	Carl B. Kerrick
	NOTH	BARBIE	Notice Of Hearing	Carl B. Kerrick
8/19/2009	NOSV	BARBIE	Notice Of Service	Carl B. Kerrick
8/21/2009	NOTH	BARBIE	Amended Notice Of Hearing	Carl B. Kerrick
8/31/2009	NOTC	BARBIE	Notice of Withdrawal of Workers' Compensation Lien	Carl B. Kerrick
9/1/2009	MOTN	BARBIE	Withdrawal of Motion to Strike, Motion for Sanctions and Notice of Hearing	Carl B. Kerrick
9/3/2009	NOSV	BARBIE	Notice Of Service	Carl B. Kerrick
9/24/2009	NOTH	BARBIE	Notice Of Hearing	Carl B. Kerrick
10/6/2009	OBJC	BARBIE	Plaintiff's Partial Objection to Defendant's Motion for Change of Venue to Clearwater County	Carl B. Kerrick
	AFFD	BARBIE	Affidavit of Ned A. Cannon in Partial Opposition to Defendant's Motion for Change of Venue	Carl B. Kerrick
10/8/2009	AFFD	BARBIE	Affidavit of Mallory E. Larson	Carl B. Kerrick
	REPL	BARBIE	Defendant's Reply to Plaintiff's Partial Objection to Defendant's Motion for Change of Venue to Clearwater County	Carl B. Kerrick
10/13/2009	CMIN	BARBIE	Court Minutes	Carl B. Kerrick
11/4/2009	NOSV	BARBIE	Notice Of Service	Carl B. Kerrick
11/10/2009	NCOC	RENEE	New Case Filed - Other Claims	John H. Bradbury
	APER	RENEE	Plaintiff: Teurlings, William P Appearance Ned A Cannon	John H. Bradbury
	APER	RENEE	Defendant: Larson, Mallory E Appearance Sonyalee R. Nutsch	John H. Bradbury
		RENEE	Filing: K1 - Order granting change of venue (pay to new county). Paid by: clements, brown & mcnichols Receipt number: 0008612 Dated: 11/13/2009 Amount: \$9.00 (Cashiers Check) For: Larson, Mallory E (defendant)	John H. Bradbury
	ORDR	RENEE	Order granting defendant's motion for change of venue	John H. Bradbury
	ORDR	RENEE	Order assigning judge	John H. Bradbury

William P Teurlings vs. Mallory E Larson

Date	Code	User		Judge
11/16/2009	ORDQ	RENEE	Order Granting Disqualification	John H. Bradbury
	CHJG	SUE	Change Assigned Judge	John R Stegner
11/19/2009	ORAJ	SUE	Order Assigning Judge	Jeff Brudie
11/24/2009	MOTN	SUE	Plaintiff's Rule 40 disqualification without cause	John R Stegner
11/25/2009	ORDR	SUE	Order assigning judge	Carl B. Kerrick
12/1/2009	ODQJ	SUE	Order granting motion for disqualification	John R Stegner
	CHJG	SUE	Change Assigned Judge	Carl B. Kerrick
4/30/2010	NOSV	VICKY	Notice Of Service	Carl B. Kerrick
8/9/2010	MOTN	COURTNEY	Defendant's Motion For Stay Under The Militia Civil Relief Act	Carl B. Kerrick
	MEMO	COURTNEY	Memorandum In Support Of Defendant's Motion For Stay Under The Militia Civil Relief Act	Carl B. Kerrick
	AFFD	COURTNEY	Affidavit Of Sonyalee R. Nutsch	Carl B. Kerrick
	AFFD	COURTNEY	Affidavit Of Mallory E. Martinez	Carl B. Kerrick
	NOTH	COURTNEY	Notice Of Hearing	Carl B. Kerrick
	HRSC	COURTNEY	Hearing Scheduled (Motion 08/24/2010 09:00 AM) AT NEZ PERCE COUNTY	Carl B. Kerrick
8/18/2010	MOTN	CAROLYNN	Plaintiff's Motion to Strike Affidavit Provisions of Mallory E. Martinez and Sonya Lee R. Nutsch, and Objection to Absolute Stay	Carl B. Kerrick
8/24/2010	HRHD	CHRISTY	Hearing result for Motion scheduled on 08/24/2010 09:00 AM: Hearing Held	Carl B. Kerrick
	DCHH	CHRISTY	Hearing result for Motion scheduled on 08/24/2010 09:00 AM: District Court Hearing Held Court Reporter: Nancy Towler Number of Transcript Pages for hearing estimated: LESS THAN 100	Carl B. Kerrick
	CMIN	CHRISTY	Hearing result for Motion scheduled on 08/24/2010 09:00 AM: Court Minutes	Carl B. Kerrick
8/25/2010	ORDR	CHRISTY	Order - Matter is STAYED until further Order of the Court.	Carl B. Kerrick
10/4/2011	STIP	CHRISTY	Stipulation to Lift Stay	Carl B. Kerrick
10/11/2011	ORDR	BARBIE	Order	Carl B. Kerrick
2/22/2012	NOSV	KCONNOR	Notice Of Service	Carl B. Kerrick
3/26/2012	NOTC	BLEE	Notice Of Taking Deposition Upon Oral Examination	Carl B. Kerrick
4/23/2012	NOSV	BARBIE	Notice Of Service	Carl B. Kerrick
	AFFD	BARBIE	Affidavit of Service RE: Tony A. Rice	Carl B. Kerrick
4/27/2012	MOTN	CHRISTY	Defendant's Motion for Summary Judgment	Carl B. Kerrick
	MEMO	CHRISTY	Memorandum in Support of Defendant's Motion for Summary Judgment	Carl B. Kerrick
	AFFD	CHRISTY	Affidavit of SSG Tony Rice	Carl B. Kerrick



William P Teurlings vs. Mallory E Larson

Date	Code	User		Judge
4/27/2012	AFFD	CHRISTY	Affidavit of Mallory E. Martinez	Carl B. Kerrick
	NOTC	CHRISTY	Notice of Hearing	Carl B. Kerrick
5/1/2012	HRSC	CHRISTY	Hearing Scheduled (Motion for Summary Judgment 06/12/2012 09:00 AM) To be heard at NP County Courthouse	Carl B. Kerrick
5/11/2012	NOSV	CHRISTY	Notice Of Service	Carl B. Kerrick
5/29/2012	APER	CHRISTY	Other party: Swift Transportation Company, Appearance Mark C Peterson	Carl B. Kerrick
		CHRISTY	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Peterson, Mark C (attorney for Swift Transportation Company,) Receipt number: 0001782 Dated: 6/5/2012 Amount: \$58.00 (Cashiers Check) For: Swift Transportation Company, (other party)	Carl B. Kerrick
	MOTN	CHRISTY	Motion To Intervene	Carl B. Kerrick
	MEMO	CHRISTY	Memorandum In Support Of Motion To Intervene	Carl B. Kerrick
	AFFD	CHRISTY	Affidavit Of Mark C. Peterson In Support Of Motion To Intervene	Carl B. Kerrick
	NOTH	CHRISTY	Notice Of Hearing RE: Motion To Intervene	Carl B. Kerrick
5/30/2012	MEMO	BARBIE	Memorandum in Opposition to Motion For Summary Judgment	Carl B. Kerrick
	MOTN	BARBIE	Motion to Stike	Carl B. Kerrick
	MEMO	BARBIE	Memorandum In Support Of Motion To Strike	Carl B. Kerrick
	AFFD	BARBIE	Affidavit of Ned A. Cannon	Carl B. Kerrick
	NOHG	BARBIE	Notice Of Hearing	Carl B. Kerrick
6/5/2012	REPL	NJOHNSTUN	Reply In Support Of Defendant's Motion For Summary Judgment	Carl B. Kerrick
	AFFD	JALLAIN	Affidavit of Sonyalee R Nutsch in support of defendant's response in opposition to Plaintiff's Motion to Strike	Carl B. Kerrick
	AFFD	JALLAIN	Affidavit of Sonyalee R. Nutsch in support of Defendant's response in opposition to Swift Transportation's motion to intervene	Carl B. Kerrick
	RESO	JALLAIN	Defendant's Response in opposition to Plaintiff's Motion to Strike	Carl B. Kerrick
	RESO	JALLAIN	Defendant's Response in opposition to Swift Transportation's Motion to Intervene	Carl B. Kerrick
6/8/2012	MOTN	HOLLIBAUGH	Swift Transportation Co., Inc.'s Reply In Support Of Motion To Intervene	Carl B. Kerrick
6/12/2012	MOTN	CHRISTY	Motion for Summary Judgment	Carl B. Kerrick
	HRHD	CHRISTY	Hearing result for Motion for Summary Judgment scheduled on 06/12/2012 09:00 AM: Hearing Held (In Nez Perce County)	Carl B. Kerrick

William P Teurlings vs. Mallory E Larson

Date	Code	User	Judge
6/12/2012	DCHH	CHRISTY	Hearing result for Motion for Summary Judgment scheduled on 06/12/2012 09:00 AM: District Court Hearing Held Court Reporter: Keith Evans Number of Transcript Pages for hearing estimated: LESS THAN 100
	CMIN	CHRISTY	Hearing result for Motion for Summary Judgment scheduled on 06/12/2012 09:00 AM: Court Minutes
7/13/2012	MEMO	CHRISTY	Memorandum Opinion and Order on Defendant's Motion for Summary Judgment and Swift Transportation Company's Motion to Intervene
	SCAN	CHRISTY	Scanned:7-24-12
7/19/2012	JDMT	CHRISTY	Judgment (Dismissed with Prejudice)
	SCAN	CHRISTY	Scanned:7-24-12
	CDIS	CHRISTY	Civil Disposition entered for: Larson, Mallory E, Defendant; Swift Transportation Company,, Other Party; Teurlings, William P, Plaintiff. Filing date: 7/19/2012
	CSCL	CHRISTY	Case Status CLOSED
7/27/2012	MOTN	CHRISTY	Motion to Reconsider
	MEMO	BARBIE	Memorandum In Support Of Motion To Reconsider
8/1/2012	MOTN	KBROWNING	Motion to Alter or Amend Judgment
	NOHG	KBROWNING	Notice Of Hearing
8/13/2012	AFFD	JALLAIN	Supplemental Affidavit of SSF Tony Rice
	NOHG	JALLAIN	Amended Notice Of Hearing
	HRSC	JALLAIN	Hearing Scheduled (Motion 08/28/2012 09:00 AM) Motion to Reconsider and Motion to Alter or Amend Judgment - hearing at NezPerce County Courthouse
	RESP	JALLAIN	Defendant's Response in Opposition to Plaintiff's Motion to Reconsider and Motion to Alter or Amend Judgment
	AFFD	JALLAIN	Affidavit of Mallory E. Martinez in Support of Defendant's Response in Opposition to Plaintiff's Motion to Reconsider and Motion to Alter or Amend Judgment
8/15/2012	NOHG	TEMP	Second Amended Notice of Hearing
8/16/2012	HRVC	TEMP	Hearing result for Motion scheduled on 08/28/2012 09:00 AM: Hearing Vacated Motion to Reconsider and Motion to Alter or Amend Judgment - hearing at NezPerce County Courthouse

Date: 12/7/2012

**Second Judicial District Court - Clearwater County**

User: BARBIE

Time: 11:58 AM

ROA Report

Page 5 of 5

Case: CV-2009-0000420 Current Judge: Carl B. Kerrick

William P Teurlings vs. Mallory E Larson

William P Teurlings vs. Mallory E Larson

Date	Code	User	Judge
8/16/2012	HRSC	TEMP	Hearing Scheduled (Motion 09/11/2012 09:00 AM) Motion to Reconsider and Motion to Alter or Amend Judgment Carl B. Kerrick
9/11/2012	CMIN	BARBIE	Court Minutes Carl B. Kerrick
10/4/2012	MEMO	JALLAIN	Memorandum Opinion and Order on Plaintiff's Motion for Reconsideration and Motion to Alter or Amend Judgment Carl B. Kerrick
11/15/2012		JALLAIN	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Smith & Cannon PLLC Receipt number: 0003614 Dated: 11/15/2012 Amount: \$109.00 (Cashiers Check) For: Teurlings, William P (plaintiff) Carl B. Kerrick
	NOTA	JALLAIN	NOTICE OF APPEAL Carl B. Kerrick
11/19/2012	BNDC	BARBIE	Bond Posted - Cash (Receipt 3641 Dated 11/19/2012 for 10.00) Carl B. Kerrick
11/20/2012	MISC	BARBIE	Clerk's Certificate of Appeal Mailed to Counsel and Supreme Court Carl B. Kerrick

NED A. CANNON, ISB No. 2331  
SMITH, CANNON & BOND PLLC  
508 Eighth Street  
Lewiston, Idaho 83501  
Telephone: (208) 743-9428  
Fax: (208) 746-8421

Attorneys for Plaintiff

FILED  
2009 JUN 6 PM 4 47  
PATRICIA TEERS  
CLERK OF THE DIST. COURT  
*Larry Rogers*

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendant.

CV09-00025

Case No.:

**COMPLAINT**

Fee Category: A.1.

Filing Fee: \$88.00

COMES NOW plaintiff, and for cause of action against defendant, alleges as follows:

**I.**

Plaintiff William P. Teurlings is a resident of the state of California.

**II.**

Defendant Mallory E. Larson was the time of collision a resident of Clearwater County, Idaho. Plaintiff is unaware of defendant Larson's current county of residence within the state of Idaho.

### **III.**

On or about January 7, 2007, plaintiff was operating a motor vehicle proceeding north on Highway 95 near Milepost 257 in Idaho County, Idaho. At such time and place, defendant Driskell was operating a motor vehicle proceeding south on Highway 95.

### **IV.**

At the date and place alleged, defendant negligently caused her motor vehicle to cross the centerline of Highway 95 and collide with the motor vehicle operated by plaintiff resulting in injuries sustained by plaintiff.

### **V.**

The negligence of defendant proximately caused damages to be sustained by plaintiff for which defendant is liable under Idaho law.

### **VI.**

Damages sustained by plaintiff for personal injury include, but are not limited to, bodily injury, emotional distress, medical expenses, and economic losses, together with future damages for personal injury proximately caused by defendant's negligence.

### **VII.**

By reason of the negligence of defendant, plaintiff has been required to employ the firm of Smith, Cannon & Bond PLLC, Attorneys at Law, Lewiston, Idaho to prosecute this action. Plaintiff should be awarded attorney's fees in this action pursuant Idaho Code §12-121 and Rule 54(e)(1) of the Idaho Rules of Civil Procedure in addition to costs and disbursements otherwise provided by law.

WHEREFORE, plaintiff prays judgment against defendants as follows:

1. For special and general damages in an amount to be proven at time of trial, exceeding the jurisdictional limits of \$10,000.00.

2. For plaintiff's costs and disbursements as provided by law together reasonable attorney's fees.

3. For such other, further and general relief as to the court may see warranted upon a hearing.

DATED this 6<sup>th</sup> day of January, 2009.

SMITH, CANNON & BOND PLLC

By: 

Ned A. Cannon,  
Of Attorneys for Plaintiff

**DEMAND FOR JURY TRIAL**

Pursuant to Rule 38(b) of the Idaho Rules of Civil Procedure, plaintiff demands a trial by jury consisting of not fewer than 12 persons.

DATED this 6<sup>th</sup> day of January, 2009.

SMITH, CANNON & BOND PLLC

By: 

Ned A. Cannon,  
Of Attorneys for Plaintiff

NED A. CANNON, ISB No. 2331  
SMITH, CANNON & BOND PLLC  
508 Eighth Street  
Lewiston, Idaho 83501  
Telephone: (208) 743-9428  
Fax: (208) 746-8421

Attorneys for Plaintiff

FILED  
2009 JAN 7 PM 2 33  
BATTY, WEND  
CLERK OF DIST. COURT  
*Anthony Rogers*

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendant.

Case No.: CV09-00025

**SUMMONS**

NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF. THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS AFTER THE DATE OF SERVICE. READ THE INFORMATION BELOW.

TO: MALLORY E. LARSON.

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within 20 days after service of this Summons upon you. If you fail to respond the court may enter judgment against you as demanded by the plaintiff in the Complaint.

ORIGINAL

A copy of the Complaint is served with the Summons. If you wish to seek the advice of or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.


An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named court.

DATED this 7th day of January, 2009.

CLERK OF THE DISTRICT COURT  
EX OFFICIO  
AUDITOR  
AND  
RECORDER  
By: Henry Rogers  
Deputy Clerk





1 ANTHONY J. GODFREY, ESQ.  
2 Calif. State Bar No.: 166250  
3 GODFREY, GODFREY & LAMB, LLP  
2119 W. Orangewood Avenue  
4 Orange, California 92868  
Telephone: (714) 935-0444  
Facsimile: (714) 935-9944

5 Attorneys for Defendants,  
6 Swift Transportation  
7

FILED

2009 JUN 9 AM 10 18

PATTY C. WEEKS  
CLERK OF THE DIST. COURT

*P. C. Weeks*  
DEPUTY

8 IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
9 STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE  
10

11 **WILLIAM TEURLINGS,**

12 **Applicant,**

13 **v.**

14 **MALLORY E. LARSON,**

15 **Defendant.**  
16  
17

**CASE No.: CV09-00025**

**NOTICE OF WORKERS'  
COMPENSATION LIEN**

18 TO ALL INTERESTED PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

19 NOTICE IS HEREBY GIVEN that Swift Transportation and its Workers' Compensation  
20 adjusting agency, Gallagher Bassett Services, by and through their attorneys of record, the law office  
21 of Godfrey, Godfrey & Lamb, LLP, submit the following lien claim in intervention in the above-  
22 captioned matter.

23 1. On or about January 7, 2007, William Teurlings was employed as a truck driver for Swift  
24 Transportation.

25 2. On or about January 7, 2007, William Teurlings sustained injury to his head, neck, hand,  
26 back and sexual dysfunction as a result of a head on collision in Idaho.

27 3. William Teurlings proceeded with a Workers' Compensation Claim in the State of  
28 California for injuries sustained as a direct result of the motor vehicle accident on January 7, 2007.

1 4. William Teurlings recovered both medical treatment and indemnity from the Workers'  
2 Compensation claim. Mr. Teurlings' claim was settled by Compromise and Release at \$55,000.00.

3 5. The amount of said lien claim is as follows:

4 Temporary Disability: \$6,841.86

5 Permanent Disability: \$55,000.00

6 Medical Care: \$30,427.88

7 **TOTAL AMOUNT OF LIEN: \$92,269.74**

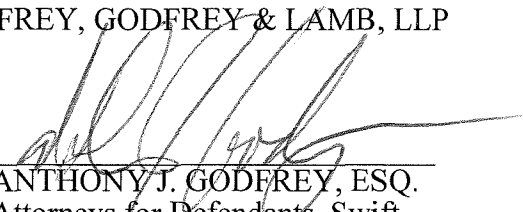
8 6. On January 6, 2009, William Teurlings filed a Complaint against Mallory Larson for  
9 injuries sustained in a motor vehicle accident on January 7, 2007 in Idaho.

10 7. Swift Transportation hereby submits the following lien claim in intervention in the above  
11 matter totaling \$92,269.74. Lien claimant reserves the right to amend, modify or supplement this  
12 claim according to proof.

13  
14 Dated: June 5, 2009

Respectfully submitted,

GODFREY, GODFREY & LAMB, LLP

15  
16 By:   
17 ANTHONY J. GODFREY, ESQ.  
18 Attorneys for Defendants, Swift  
19 Transportation and their Adjusting  
20 Agency Gallagher Bassett Services  
21  
22  
23  
24  
25  
26  
27  
28

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is GODFREY, GODFREY & LAMB, LLP, 2119 W. Orangewood Avenue, Orange, California, 92868.

On June 5, 2009, I served the foregoing document(s) described as NOTICE OF WORKERS' COMPENSATION LIEN on the interested parties in this action addressed as follows:

DISTRICT COURT OF THE  
SECOND JUDICIAL DISTRICT  
1230 Main Street  
P.O. Box 896  
Lewiston, ID 83501

COLE, FISHER, BOSQUEZ-FLORES, COLE  
& O'KEEFE  
Post Office Box 391  
Fresno, CA 93708  
Attn: Joseph G. O'Keefe, Esq.

GALLAGHER BASSETT SERVICES, INC.  
P.O. Box 255397  
Sacramento, CA 95865  
Attn: Ted Kuhl

SMITH, CANNON & BOND, PLLC  
508 Eighth Street  
Lewiston, ID 83501  
Attn: Ned A. Cannon, Esq.

SWIFT TRANSPORTATION  
Attn: Mindi Robb (*E-Mail Only*)  
P.O. Box 29243  
Phoenix, AZ 85038

Said service was made by placing true copies thereof enclosed in a sealed envelope(s) addressed as stated above AND,

- ☒ Placing the envelope for collection and mailing on the date and at our business address following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

Executed on June 5, 2009 at Orange, California.

☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

  
Mirtha Tavares

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

FILED  
2009 JUL 27 AM 11 55  
PAULINE DEAS  
CLERK OF THE DIST. COURT  
DEPUTY  
*Amel Schone*

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

WILLIAM P. TEURLINGS,	)	
	)	Case No: CV09-0025
	)	
Plaintiff,	)	ANSWER AND DEMAND
	)	FOR JURY TRIAL
vs.	)	
	)	
MALLORY E. LARSON,	)	
	)	
	)	
Defendant.	)	
	)	

Defendant, by and through her attorney of record, Sonyalee R. Nutsch of Clements, Brown & McNichols, P.A., answers plaintiff's Complaint as follows:

- I. Defendant lacks sufficient knowledge to form a belief as to the truth of the allegations of paragraph I, and therefore denies them.
- II. Answering paragraph II, defendant admits that defendant is a resident of Clearwater County, Idaho.
- III. Answering paragraph III, defendant admits that on January 7, 2007,

ANSWER AND DEMAND  
FOR JURY TRIAL

plaintiff was operating a motor vehicle proceeding north on Highway 95 near Milepost 257 in Idaho County, Idaho. Defendant does not know who “Driskell” is and therefore lacks sufficient knowledge to form a belief as to the truth of the remaining allegations of paragraph III, and denies them.

- IV. Defendant denies paragraph IV.
- V. Defendant denies paragraph V.
- VI. Defendant denies paragraph VI.
- VII. Defendant admits that plaintiff has retained Smith, Cannon & Bond PLLC, Attorneys at Law to represent her in this matter but defendant denies the remaining allegations and inferences contained in paragraph VII.

Defendant denies any allegations and potential allegations alleged in plaintiff’s prayer for relief.

### **AFFIRMATIVE DEFENSES**

1. Further investigation and discovery may reveal that the accident was caused by the negligence of plaintiff, whose negligence equals or exceeds that of defendant, if any.

2. Further investigation and discovery may reveal that the accident was caused by the negligence of others, for whose negligence defendant cannot be held liable.

3. Further investigation and discovery may reveal that plaintiff has failed to mitigate his damages.

4. At all times material to plaintiff's Complaint, defendant was on-duty serving with the HHC 145<sup>th</sup> BSB unit of the Idaho National Guard. Further investigation and discovery may reveal that plaintiff has failed to comply with I.C. § 6-905.

5. Further investigation and discovery may reveal that certain statutory defenses are available to defendant pursuant to I.C. § 6-901 *et. seq.* which include but are not limited to, immunity under Idaho Code §§ 6-904(4).


6. Further investigation and discovery may reveal that defendant is immune from liability pursuant to I.C. § 46-402.

7. Pursuant to IRCP 12 (b) (3), plaintiff has failed to file this case in the proper venue.

WHEREFORE, defendant prays that plaintiff's Complaint be dismissed with prejudice and that defendant be awarded her costs and attorney fees incurred in this matter.

DATED this 24<sup>th</sup> day of July 2009.

CLEMENTS, BROWN & McNICHOLS, P.A.

By   
SONYALEE R. NUTSCH  
Attorneys for Defendant

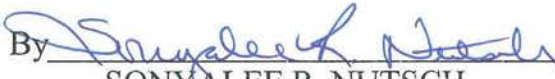


### DEMAND FOR JURY TRIAL

Demand is hereby made for a trial of all issues which may appropriately be tried to a jury. Defendant will not stipulate to a jury less than twelve (12) persons.

DATED this 24<sup>th</sup> day of July 2009.

CLEMENTS, BROWN & McNICHOLS, P.A.

By   
SONYALEE R. NUTSCH  
Attorneys for Defendant

### CERTIFICATE OF SERVICE

I hereby certify that on the 24<sup>th</sup> of July 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith, Cannon & Bond PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501

☒ U.S. MAIL  
☐ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☐ TELECOPY (FAX)

  
Sonyalee R. Nutsch

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

FILED  
2009 JUL 27 AM 11 55  
CLERK OF THE DISTRICT COURT  
DEPUTY  
*[Signature]*

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

WILLIAM P. TEURLINGS,	)	Case No: CV09-0025
	)	
	)	MOTION FOR CHANGE OF
Plaintiff,	)	VENUE TO CLEARWATER
	)	COUNTY
vs.	)	
	)	Category I.1.a.
MALLORY E. LARSON,	)	Fee Category: 58.00
	)	
	)	
Defendant.	)	
	)	


Defendant moves the Court, pursuant to Idaho Rule of Civil Procedure 12(b)(3), to change the venue from Nez Perce County to Clearwater County, on the grounds that the defendant is and was at the time plaintiff filed his Complaint, a resident of Orofino, Clearwater County, Idaho. Additionally, the incident that is the subject matter of plaintiff's Complaint occurred in Idaho County so there is no proper basis for the venue of this matter to be in Nez Perce County. (See Plaintiff's Complaint, 1/6/2009).

MOTION FOR CHANGE OF VENUE  
TO CLEARWATER COUNTY



DATED this 24<sup>th</sup> day of July 2009.

CLEMENTS, BROWN & McNICHOLS, P.A.

By   
SONYALEE R. NUTSCH  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 24<sup>th</sup> of July 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith, Cannon & Bond PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501

☒ U.S. MAIL  
☐ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☐ TELECOPY (FAX)

  
Sonyalee R. Nutsch

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

FILED  
2009 JUL 30 AM 10 13

PATTY O. WEEKS  
CLERK OF THE DIST. COURT  
CASE NO. CV09-00025  
DEPUTY

WILLIAM P. TEURLINGS ,

PLAINTIFF (S),

vs

MALLORY E. LARSON ,

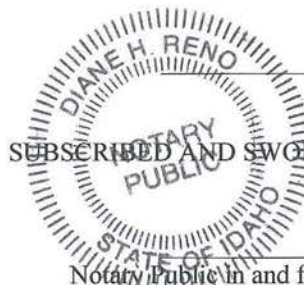
DEFENDANT (S),

AFFIDAVIT OF SERVICE

STATE OF IDAHO )  
 ) ss.  
COUNTY OF NEZ PERCE )

The undersigned, being duly sworn, on oath deposes and says: That he is now and at all times herein mentioned was a citizen of the United States, over the age of twenty-one years, not a party to or interested in the above-entitled action and competent to be a witness therein;

That on JULY 9, 2009 , at 9:04 A.M. , at the address of 12878 VISTA, OROFINO, ID 83544 ,being the dwelling house and/or the usual place of abode of the defendant MALLORY E. LARSON this affiant duly served a SUMMONS AND COMPLAINT in the above-entitled action upon said defendant, MALLORY E. LARSON by then and there personally delivering a true and correct copy thereof into the hands of and leaving same with JESUS MARTINEZ a person over the age of eighteen (18) years, then residing therein.



E. L. RENO  
E. L. RENO, PROCESS SERVER

SUBSCRIBED AND SWORN to before me on

July 9 2009  
Diane H. Reno  
Notary Public in and for the State of Idaho,  
Residing at LEWISTON

My commission expires : APRIL 10, 2012

8600  
SERVICE: \$  
AFF/SUB 2/05

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

FILED  
2009 AUG 5 AM 10:07  
PATRICIA WHEELS  
CLERK OF THE DISTRICT COURT  
DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

WILLIAM P. TEURLINGS,	)	Case No: CV09-0025
	)	
	)	DEFENDANT'S RESPONSE IN
Plaintiff,	)	OPPOSITION OF SWIFT
	)	TRANSPORTATION'S WORKERS'
vs.	)	COMPENSTATION LIEN
	)	
MALLORY E. LARSON,	)	
	)	
	)	
Defendant.	)	
_____	)	

I.

INTRODUCTION

On June 9, 2009, Swift Transportation ("Swift"), by and through its attorney Anthony J. Godfrey, filed a Notice of Workers' Compensation Lien. As explained below, Swift's Notice should be stricken from the record.

DEFENDANT'S RESPONSE IN  
OPPOSITION OF SWIFT  
TRANSPORTATION'S WORKERS'  
COMPENSATION LIEN

## II.

### ARGUMENT

**A. SWIFT’S NOTICE OF WORKERS’ COMPENSATION LIEN SHOULD BE STRICKEN FROM THE RECORD BECAUSE IT WAS FILED BY AN ATTORNEY WHO IS NOT LICENSED TO PRACTICE LAW IN THE STATE OF IDAHO.**

Idaho Rule of Civil Procedure 11(a)(1) requires that “[e]very pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one (1) licensed attorney of record of the state of Idaho, in the attorney’s individual name, whose address shall be stated before the same may be filed.” *Id.*

Swift’s Workers’ Compensation Lien was filed by Anthony J. Godfrey, Esq. Mr. Godfrey listed his California address and his California bar number on the pleading. Mr. Godfrey is not listed in the Idaho bar directory as an attorney currently licensed to practice law in the state of Idaho. As a result, Swift’s notice was filed in violation of IRCP 11 (a)(1).

Pursuant to IRCP 11(a)(1), “[i]f a pleading motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading , motion or other paper, including a reasonable attorney’s fee.” *Id.*

Because Swift has filed its Notice in violation of IRCP 11, defendant respectfully requests that the Notice be stricken from the record and Swift ordered to pay the

reasonable attorney fees incurred by defendant because of the filing of the Notice.

**B. FILING A LIEN IN THIS LAWSUIT IS PROCEDURALLY IMPROPER**

Swift claims in its Notice of Worker's Compensation Lien that it has paid a total of \$92,269.74 for a worker's compensation claim that William Teurlings ("plaintiff") filed in the state of California. Defendant in this matter was obviously not a party to the California workers compensation claim nor did she have an opportunity to participate in the settlement reached by the parties in that matter.

Although Swift may have a contractual or statutory right of subrogation, filing a lien in this case is not the procedurally proper way for Swift to preserve its right of subrogation. Idaho law does not provide for a statutory lien for worker's compensation benefits paid. *See* I.C. § 72-223. If California law allows for such a lien or plaintiff has contractually agreed to the lien, Swift will need to go through the legal processes necessary to record a foreign lien in Idaho. Filing the lien in this lawsuit is not legally or procedurally proper and the Notice should be stricken by the Court.


**III.**

**CONCLUSION**

Based on the foregoing, defendant respectfully requests that Swift's Notice of Workers' Compensation Lien be stricken from the record and Swift ordered to pay the reasonable attorney fees incurred by defendant because of the filing of the Notice.

DATED this 4<sup>th</sup> day of August 2009.

CLEMENTS, BROWN & McNICHOLS, P.A.

By   
SONYALEE R. NUTSCH  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 4<sup>th</sup> of August 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith, Cannon & Bond PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501

Anthony J. Godfrey, ESQ.  
Godfrey, Godfrey & Lamb, LLP  
2119 W. Oranewood Avenue  
Orange, California 92868

☒ U.S. MAIL  
☐ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☐ TELECOPY (FAX)

  
Sonyalee R. Nutsch



Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

FILED  
2009 AUG 12 AM 9 54  
PATRICIA A. WICK  
CLERK OF THE DISTRICT COURT  
*Patricia A. Wick*  
DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

WILLIAM P. TEURLINGS,	)	Case No: CV09-0025
	)	
	)	DEFENDANT'S MOTION TO
Plaintiff,	)	STRIKE SWIFT TRANSPORTATION'S
	)	WORKERS' COMPENSATION LIEN
vs.	)	AND MOTION FOR SANCTIONS
	)	
MALLORY E. LARSON,	)	
	)	
	)	
Defendant.	)	
_____	)	


Defendant, by and through her attorney of record, Sonyalee R. Nutsch of Clements, Brown & McNichols, P.A., pursuant to Idaho Rule of Civil Procedure 11, moves to strike Swift Transportations' Workers' Compensation lien filed with this Court on June 9, 2009 and further moves for Rule 11 sanctions.

This Motion is supported by Defendant's Response in Opposition of Swift Transportation's Workers' Compensation Lien filed on August 4, 2009.

DEFENDANT'S MOTION TO  
STRIKE SWIFT TRANSPORTATION'S  
WORKERS' COMPENSATION LIEN  
AND MOTION FOR SANCTIONS

DATED this 11<sup>th</sup> day of August 2009.

CLEMENTS, BROWN & McNICHOLS, P.A.

By   
SONYALEE R. NUTSCH  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 11<sup>th</sup> of August 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith, Cannon & Bond PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501  
(208) 746-8421 – facsimile

Anthony J. Godfrey, ESQ.  
Godfrey, Godfrey & Lamb, LLP  
2119 W. Orangewood Avenue  
Orange, California 92868  
(714) 935-9944 – facsimile

X U.S. MAIL  
— HAND DELIVERED  
— OVERNIGHT MAIL  
X TELECOPY (FAX)

  
Sonyalee R. Nutsch

DEFENDANT'S MOTION TO  
STRIKE SWIFT TRANSPORTATION'S  
WORKERS' COMPENSATION LIEN  
AND MOTION FOR SANCTIONS



Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

FILED  
2009 AUG 12 AM 9 54

FATIMA GREEN  
CLERK OF THE DIST. COURT  
*Fatima Green*  
DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

WILLIAM P. TEURLINGS, )  
 )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MALLORY E. LARSON, )  
 )  
 Defendants )  
 \_\_\_\_\_ )


Case No: CV09-00025

NOTICE OF HEARING

PLEASE TAKE NOTICE, that the undersigned will call up for hearing, defendant's MOTION TO STRIKE before The Honorable Carl B. Kerrick at the Nez Perce County Courthouse on Tuesday, the 25th day of August, 2009, at 9:00a.m., or as soon thereafter as counsel may be heard.

DATED this 11th day of August 2009.

CLEMENTS, BROWN & McNICHOLS, P.A.

By   
SONYALEE R. NUTSCH  
Attorneys for Defendant


CERTIFICATE OF SERVICE

I hereby certify that on the 11<sup>th</sup> of August 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith, Cannon & Bond, PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501  
(208) 746-8421 – facsimile

Anthony J. Godfrey, ESQ.  
Godfrey, Godfrey & Lamb, LLP  
2119 W. Orangewood Avenue  
Orange, California 92868  
(714) 935-9944 – facsimile

  X   U.S. MAIL  
     HAND DELIVERED (via Valley Messenger)  
     OVERNIGHT MAIL  
  X   TELECOPY (FAX)

  
Sonyalee R. Nutsch

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

Attorneys for Defendant

FILED  
2009 AUG 19 AM 9 36

PATLY C. WEEKS  
CLERK OF THE DIST. COURT  
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

WILLIAM P. TEURLINGS,

Plaintiff,

vs.

MALLORY E. LARSON,

Defendants

Case No: CV09-00025

NOTICE OF SERVICE

I, Sonyalee R. Nutsch, attorney for defendant, pursuant to I.R.C.P. 33(a)(5), and 34(d) certify that on the 18<sup>th</sup> day of August, 2009, DEFENDANT'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF were served on counsel for plaintiff, Ned A. Cannon.

DATED this 18<sup>th</sup> day of August 2009.

CLEMENTS, BROWN & McNICHOLS, P.A.

By Sonyalee R. Nutsch  
SONYALEE R. NUTSCH  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 18<sup>th</sup> day of August 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith, Cannon & Bond, PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501

☐ U.S. MAIL  
☒ HAND DELIVERED (via Valley Messenger)  
☐ OVERNIGHT MAIL  
☐ TELECOPY (FAX)

  
Sonyalee R. Nutsch

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

FILED  
2009 AUG 21 AM 11 52

PATTY D. WEEKS  
CLERK OF THE DIST. COURT  
*Patty Weeks*  
DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

WILLIAM P. TEURLINGS,

Plaintiff,

vs.

MALLORY E. LARSON,

Defendants

Case No: CV09-00025

**AMENDED**  
**NOTICE OF HEARING**


PLEASE TAKE NOTICE, that the undersigned will call up for hearing, defendant's MOTION TO STRIKE before The Honorable Carl B. Kerrick at the Nez Perce County Courthouse on **Tuesday, the 29th day of September, 2009**, at 9:00a.m., or as soon thereafter as counsel may be heard.

**AMENDED NOTICE OF  
HEARING**



DATED this 21st day of August 2009.

CLEMENTS, BROWN & McNICHOLS, P.A.

By   
SONYALEE R. NUTSCH  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 21<sup>st</sup> of August 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith, Cannon & Bond, PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501  
(208) 746-8421 – facsimile

Anthony J. Godfrey, ESQ.  
Godfrey, Godfrey & Lamb, LLP  
2119 W. Oranewood Avenue  
Orange, California 92868  
(714) 935-9944 – facsimile

X U.S. MAIL  
— HAND DELIVERED (via Valley Messenger)  
— OVERNIGHT MAIL  
X TELECOPY (FAX)

  
Sonyalee R. Nutsch

1 ANTHONY J. GODFREY, ESQ.  
2 Calif. State Bar No.: 166250  
3 GODFREY, GODFREY & LAMB, LLP  
4 2119 W. Oranewood Avenue  
Orange, California 92868  
Telephone: (714) 935-0444  
Facsimile: (714) 935-9944

5 Attorneys for Defendants,  
6 Swift Transportation

FILED  
2009 AUG 31 AM 10 07  
PATTY O. WEEKS  
CLERK OF THE DIST. COURT  
DEPUTY

7  
8 IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
9 STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

10  
11 **WILLIAM TEURLINGS,**

12 **Applicant,**

13 **v.**

14 **MALLORY E. LARSON,**

15 **Defendant.**

**CASE No.: CV09-00025**

**NOTICE OF WITHDRAWAL OF  
WORKERS' COMPENSATION LIEN**

16  
17  
18  
19 TO ALL INTERESTED PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

20 NOTICE IS HEREBY GIVEN that Swift Transportation and its Workers' Compensation  
21 adjusting agency, Gallagher Bassett Services, by and through their attorneys of record, the law office  
22 of Godfrey, Godfrey & Lamb, LLP, hereby withdraw the previously filed Notice of Workers'  
23 Compensation Lien.

24 ///

25 ///

26 ///

27 ///

28 ///

1           The withdrawal of the Workers' Compensation lien is not intended to waive any rights Swift  
2 may have for seeking subrogation rights in Mr. Teurlings' civil claim against Mallory Larson.

3                               Respectfully submitted,

4   Dated: August 27, 2009

GODFREY, GODFREY & LAMB, LLP

6                               By: 

7                               ANTHONY J. GODFREY, ESQ.  
8                               Attorneys for Defendants, Swift  
9                               Transportation and their Adjusting  
10                              Agency Gallagher Bassett Services



PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is GODFREY, GODFREY & LAMB, LLP, 2119 W. Orangewood Avenue, Orange, California, 92868.

On August 27, 2009, I served the foregoing document(s) described as NOTICE OF WORKERS' COMPENSATION LIEN on the interested parties in this action addressed as follows:

DISTRICT COURT OF THE  
SECOND JUDICIAL DISTRICT  
1230 Main Street  
P.O. Box 896  
Lewiston, ID 83501

SMITH, CANNON & BOND, PLLC  
508 Eighth Street  
Lewiston, ID 83501  
Attn: Ned A. Cannon, Esq.

GALLAGHER BASSETT SERVICES, INC.  
P.O. Box 255397  
Sacramento, CA 95865  
Attn: Ted Kuhl

RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336  
Attn: Marc A. Lyons

SWIFT TRANSPORTATION  
Attn: Mindi Robb (*E-Mail Only*)  
P.O. Box 29243  
Phoenix, AZ 85038

CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13<sup>th</sup> Street  
P.O. Box 1510  
Lewiston, ID 83501  
Attn: Sonyalee R. Nutsch


COLE, FISHER, BOSQUEZ-FLORES, COLE  
& O'KEEFE  
Post Office Box 391  
Fresno, CA 93708  
Attn: Joseph G. O'Keefe, Esq.

Said service was made by placing true copies thereof enclosed in a sealed envelope(s) addressed as stated above AND,

☒ Placing the envelope for collection and mailing on the date and at our business address following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

Executed on August 27, 2009 at Orange, California.

☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

  
Mirtha Tavares

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

Attorneys for Defendant

FILED  
2009 SEP 1 AM 11 51  
PATIENCE WEEKS  
CLERK OF THE DIST. COURT  
James L. Brown  
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE


WILLIAM P. TEURLINGS,	)	Case No: CV09-0025
	)	
	)	WITHDRAWAL OF MOTION
Plaintiff,	)	TO STRIKE, MOTION FOR
	)	SANCTIONS AND NOTICE OF
vs.	)	HEARING
	)	
MALLORY E. LARSON,	)	
	)	
	)	
Defendant.	)	
	)	

Mr. Godfrey, having filed on August 31, 2009, the Notice of Withdrawal of Workers' Compensation lien filed on June 9, 2009, defendant hereby withdraws her Motion to Strike and Motion for Sanctions filed on August 11, 2009, as well as the Amended Notice of Hearing on defendants motions filed on August 21, 2009.

WITHDRAWAL OF MOTION TO  
STRIKE, MOTION FOR SANCTIONS  
AND NOTICE OF HEARING

Dated this 1<sup>st</sup> day of September 2009

CLEMENTS, BROWN & McNICHOLS, P.A.

By:   
SONYALEE R. NUTSCH  
Attorneys for Defendant


CERTIFICATE OF SERVICE

I hereby certify that on the 1<sup>st</sup> day of September 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith, Cannon & Bond, PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501  
(208) 746-8421 – facsimile

Anthony J. Godfrey, ESQ.  
Godfrey, Godfrey & Lamb, LLP  
2119 W. Oranewood Avenue  
Orange, California 92868  
(714) 935-9944 – facsimile

  X   U.S. MAIL  
      HAND DELIVERED (via Valley Messenger)  
      OVERNIGHT MAIL  
  X   TELECOPY (FAX)

  
Sonyalee R. Nutsch

WITHDRAWAL OF MOTION TO  
STRIKE, MOTION FOR SANCTIONS  
AND NOTICE OF HEARING

FILED

2009 SEP 03 AM 9 42

PATTY G. WEEKS  
CLERK OF THE DISTRICT COURT  
*Patty Weeks*  
DEPUTY

NED A. CANNON, ISB No. 2331  
SMITH & CANNON PLLC  
Attorney for Plaintiff  
508 Eighth Street  
Lewiston, ID 83501  
Telephone: (208) 743-9428  
Fax: (208) 746-8421

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendant.

Case No.: CV 09-00025

NOTICE OF SERVICE

I, Ned A. Cannon, declare that, on the date indicated below, I served true and correct copies of Plaintiff's First Set of Interrogatories and Requests for Production of Documents to Defendant on Mallory Larson through her counsel via the method indicated below:

Sonyalee R. Nutsch  
Clements Brown & McNichols  
321 13th Street  
Lewiston, ID 83501

**Via:**

- ☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☐ Email (pdf attachment)

Signed this 1<sup>st</sup> day of September, 2009, at Lewiston, Idaho.

*Ned A. Cannon*  
Ned A. Cannon

**CERTIFICATE OF SERVICE**

I, Ned A. Cannon, declare that, on the date indicated below, I served a true and correct copy of Plaintiff's First Set of Interrogatories and Requests for Production of Documents and Notice of Service on Mallory Larson through her counsel via the method(s) indicated below:

Sonyalee Nutsch  
Clements Brown & McNichols  
321 13th Street  
Lewiston, ID 83501

**Via:**

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile

Signed this 1<sup>st</sup> day of September, 2009, at Lewiston, Idaho.

  
Ned A. Cannon



Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

FILED  
2009 SEP 24 AM 9:28  
PATTY C. WEEKS  
CLERK OF THE DIST. COURT  
*P. C. Weeks*  
DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

WILLIAM P. TEURLINGS,	)	
	)	Case No: CV09-00025
	)	
Plaintiff,	)	
	)	NOTICE OF HEARING
vs.	)	
	)	
MALLORY E. LARSON,	)	
	)	
Defendants.	)	
	)	


TO: Plaintiff, WILLIAM P. TEURLINGS, and to your attorney of record, NED  
A. CANNON:

PLEASE TAKE NOTICE, that the undersigned will call up for hearing,  
defendant's MOTION FOR CHANGE OF VENUE before The Honorable Carl B.  
Kerrick at the Nez Perce County Courthouse on Tuesday, the 13<sup>th</sup> day of October, 2009,  
at 9:00 a.m., or as soon thereafter as counsel may be heard.



DATED this 23rd day of September 2009.

CLEMENTS, BROWN & McNICHOLS, P.A.


By   
SONYALEE R. NUTSCH  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd of September 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith, Cannon & Bond, PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501  
(208) 746-8421 – facsimile

  X   U.S. MAIL  
     HAND DELIVERED (via Valley Messenger)  
     OVERNIGHT MAIL  
     TELECOPY (FAX)

  
Sonyalee R. Nutsch

FILED

2009 OCT 6 PM 4 55

PATTY O. WEEKS  
CLERK OF THE DIST. COURT

DEPUTY

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendant.

Case No.: CV 09-00025

PLAINTIFF'S PARTIAL OBJECTION TO  
DEFENDANT'S MOTION FOR CHANGE  
OF VENUE TO CLEARWATER COUNTY

COMES NOW the Plaintiff by and through his attorney of record, Ned A. Cannon, of the firm Smith & Cannon PLLC, Lewiston, Idaho, and hereby files his Partial Objection to Defendant's Motion for Change of Venue to Clearwater County.

This Action stems from an automobile collision purportedly caused by Defendant in Idaho County, Idaho, in January 2007. Defendant was cited for a moving infraction under and pursuant to Idaho Code § 49-14013 and was processed through the Courts of Idaho County, Idaho.

Under and pursuant to Idaho Rule of Civil Procedure 12(b)(3) and Idaho Code §§ 5-401,

PLAINTIFF'S PARTIAL OBJECTION  
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CLEARWATER COUNTY

et seq. and as shown by the case law referenced below this Court has discretion regarding the venue.

This objection is noted as partial objection in that Defendant's Motion is correct that the venue of this Action should be located in Idaho County, Idaho, or Clearwater County, Idaho.

Filed contemporaneously herewith is an Affidavit of Ned A. Cannon, attaching the Idaho Vehicle Collision Report and driver/witness statements for this Court's review. It is referenced on Defendant Mallory Larson's driver's statement that her address was 11692 W Trinity Avenue, Nampa, Idaho 83651. It is also noted that Defendant Larson's passenger, Danielle R. Poe, resides in Boise, Idaho, and thus is more conveniently located to the Courts of Idaho County rather than Clearwater County.

Furthermore, on said Affidavit it is noted that witness Joe Byrd resides at 416 Elk Street, Grangeville, Idaho. Plaintiff William Teurlings lives in Fresno, California. Witness Peter Molton resides in Burbank, Washington.

In the case of Richards v. Anderson Erickson Dairy Co. v. Estate of Sarah Dahlke, et al., 699 N.W.2d 676, a true and accurate copy of which is attached hereto, The Court, in dealing with venue statutes similar to those in the case at bar, held, among other things, "... when venue is proper in multiple counties, the Plaintiff may choose where to file and the District Court lacks the discretion to transfer the case ...". Such holding was similar to that Idaho case of Hayes v. Kingston, 140 Idaho 551, wherein the Court, under a different fact pattern, dealt with, among other things, venue being proper in the County "the cause of action arose in".


In this case, Defendant asks this Court to find proper and controlling venue in Clearwater County, notwithstanding that the only contact this action has to Clearwater County is that the

Defendant currently resides in said county.

Based upon the foregoing and upon the files and records herein it is requested that venue be found appropriate in Idaho County, Idaho, and the case files be transferred from Nez Perce County for further proceedings.

DATED this 6<sup>th</sup> day of October, 2009.

SMITH & CANNON PLLC

  
Ned A. Cannon, of attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I, Ned A. Cannon, declare that, on the date indicated below, I served a true and correct copy of *Plaintiff's Partial Objection to Defendants Motion For Change of Venue to Clearwater County* and on Mallory Larson through her counsel via the method(s) indicated below:

Sonyalee Nutsch  
Clements Brown & McNichols  
321 13th Street  
Lewiston, ID 83501

**Via:**

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email (pdf attachment)

Signed this 6<sup>th</sup> day of October, 2009, at Lewiston, Idaho.

  
Ned A. Cannon

Westlaw

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**H**

Supreme Court of Iowa.  
Lorraine RICHARDS and Ward Richards, Appel-  
lants,  
v.  
ANDERSON ERICKSON DAIRY CO., Gary Link,  
Kellie Barney and Mary Barney, Appellees.  
Anderson Erickson Dairy Co. and Gary Link, Ap-  
pellees,  
v.  
Estate of Sarah Dahlke, Connie Dahlke, Rodney  
Naber, Charles Funke, Henry Brunsman, Lavern  
Willenborg, Brian Buhrow and Janet Buhrow, Ap-  
pellees.  
**No. 04-0644.**

July 8, 2005.  
Rehearing Denied July 28, 2005.

**Background:** Motorists who were involved in chain-reaction collision sued owner of semi-truck, truck driver, and operator and owner of another car involved in accident. After granting motion for change of venue filed by owner of semi-truck and truck driver, the District Court, Grundy County, Bruce B. Zager, J., entered judgment on jury verdict in favor of defendants, and denied motorists' motion for new trial. Motorists appealed.

**Holding:** The Supreme Court, Streit, J., held that semi-truck driver was entitled to have case moved to a proper venue, even though owner of semi-truck was suable in any county through which semi-truck was operated.

Affirmed.

West Headnotes

**[1] Appeal and Error 30 ⚡867(1)**

30 Appeal and Error  
30XVI Review  
30XVI(A) Scope, Standards, and Extent, in

General

30k862 Extent of Review Dependent on  
Nature of Decision Appealed from  
30k867 On Appeal from Decision on  
Motion for New Trial or After Grant of New Trial  
30k867(1) k. In General. Most  
Cited Cases

**Appeal and Error 30 ⚡977(1)**

30 Appeal and Error  
30XVI Review  
30XVI(H) Discretion of Lower Court  
30k976 New Trial or Rehearing  
30k977 In General  
30k977(1) k. In General. Most  
Cited Cases

The scope of the Supreme Court's review of a district court's ruling on a motion for new trial depends on the grounds raised in the motion; to the extent the motion is based on a discretionary ground, the Court reviews it for an abuse of discretion, but if the motion is based on a legal question, review is on error.

**[2] Appeal and Error 30 ⚡840(1)**

30 Appeal and Error  
30XVI Review  
30XVI(A) Scope, Standards, and Extent, in  
General  
30k838 Questions Considered  
30k840 Review of Specific Questions  
and Particular Decisions  
30k840(1) k. In General. Most  
Cited Cases

**Appeal and Error 30 ⚡965**

30 Appeal and Error  
30XVI Review  
30XVI(H) Discretion of Lower Court  
30k963 Proceedings Preliminary to Trial  
30k965 k. Change of Venue. Most  
Cited Cases



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#### Venue 401 ⚡46

##### 401 Venue

###### 401III Change of Venue or Place of Trial

401k46 k. Action Not Brought in Proper County or District. Most Cited Cases

Court rule requiring a district court to move the case to another county if it was brought in the wrong county does not implicate the discretionary judgment of the district court and, therefore, the Supreme Court's review in case involving change of venue under rule is for errors at law, not an abuse of discretion. I.C.A. Rule 1.808.

#### [3] Venue 401 ⚡32(1)

##### 401 Venue

###### 401II Domicile or Residence of Parties

401k32 Objections and Exceptions, Estoppel, and Waiver

###### 401k32(1) k. In General. Most Cited Cases

In Iowa, there is a long-standing preference for trying cases in the county of a defendant's residence. I.C.A. § 616.17.

#### [4] Venue 401 ⚡22(6)

##### 401 Venue

###### 401II Domicile or Residence of Parties

###### 401k20 Privileges of Defendants

###### 401k22 Codefendants

401k22(6) k. Particular Actions, Application To. Most Cited Cases

A personal-injury lawsuit arising from a chain-reaction collision was a "personal action" for purposes of Iowa's general venue statute and, thus, venue was proper in both counties in which at least one defendant resided. I.C.A. § 616.17.

#### [5] Venue 401 ⚡8.2

##### 401 Venue

###### 401I Nature or Subject of Action

###### 401k8 Actions for Torts

401k8.2 k. Particular Torts. Most Cited Cases

#### Venue 401 ⚡22(6)

##### 401 Venue

###### 401II Domicile or Residence of Parties

###### 401k20 Privileges of Defendants

###### 401k22 Codefendants

401k22(6) k. Particular Actions, Application To. Most Cited Cases

Venue in personal-injury lawsuit arising from a chain-reaction collision was not only proper in counties of the residences of various defendants, but also proper in county that was the scene of the collision. I.C.A. §§ 616.17, 616.18.

#### [6] Venue 401 ⚡46

##### 401 Venue

###### 401III Change of Venue or Place of Trial

401k46 k. Action Not Brought in Proper County or District. Most Cited Cases

Even though owner of semi-truck was suable in any county through which semi-truck was operated, under common carrier statute, owner was not a resident of county that otherwise had no other connection with chain-reaction collision giving rise to personal injury action and, therefore, semi-truck driver was entitled to have case moved to a proper venue. I.C.A. § 616.8; I.C.A. Rule 1.808.

#### [7] Venue 401 ⚡52(1)

##### 401 Venue

###### 401III Change of Venue or Place of Trial

###### 401k52 Convenience of Witnesses

401k52(1) k. In General. Most Cited Cases  
Venue statutes are statutes of convenience.

#### [8] Venue 401 ⚡22(7.1)

##### 401 Venue

###### 401II Domicile or Residence of Parties

###### 401k20 Privileges of Defendants

###### 401k22 Codefendants

401k22(7) Particular Classes of Parties, Application to

401k22(7.1) k. In General. Most

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## Cited Cases

At least as with respect to non-common carrier defendants, the common carrier statute, which allows a common carrier to be sued in any county through which its roads or lines pass or operate, does not fall within the except-as-otherwise-provided exception to the general venue statute, which generally requires personal actions to be brought in a county in which at least one defendant resides. I.C.A. §§ 616.8, 616.17.

\*677 David P. McManus of Glasson, Sole, McManus & Pearson, P.C., Cedar Rapids, for appellants.

Richard S. Fry and Heather L. Fleming of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellees Anderson Erickson and Link.

Scott E. McLeod and Todd Slagter of Lynch Dallas, P.C., Cedar Rapids, for appellees Dahlke.

Natalie Burris of Swisher & Cohrt, P.L.C., Waterloo, for appellees Naber and Funke.

Matthew Petrzelka of Simmons, Perrine, Albright & Ellwood, Cedar Rapids, for appellees Barney.

James P. Craig of Moyer & Bergman, P.L.C., Cedar Rapids, for appellees Brunzman and Willenborg.

STREIT, Justice.

Iowa City must be a special place. The plaintiffs in this personal-injury action filed suit in Johnson County, notwithstanding the fact that it hardly had any connection to the case. The district court granted the defendants' motion for a change of venue. The plaintiffs lost their trial and now appeal the venue change. Because we agree venue was not proper in Johnson County, we affirm.

### I. Facts and Prior Proceedings

This appeal stems from a chain-reaction collision on a highway in Grundy County in \*678 early 2001. The accident involved a semi-truck owned by

the Anderson Erickson Dairy Company ("AE"). Lorraine and Ward Richards suffered injuries in the accident and sued AE for negligence. They also sued Gary Link, the AE employee driving the semi-truck, and Kellie and Mary Barney, the operator and the owner of another car involved in the accident.

The Richards filed their lawsuit in Johnson County, even though none of the parties resided there. The Richards are residents of Grundy County; Link is a resident of Story County; the Barneys are residents of Polk County; and AE is an Iowa corporation whose principal place of business is in Polk County. Although the motivation for filing in Johnson County remains unknown,<sup>FN1</sup> the Richards claimed venue was proper there because AE regularly drove its trucks through Johnson County.

FN1. In their reply brief, however, the Richards state "Of course this court is fully aware of the strategy reasons that are back [sic] of this litigation."

Before filing an answer, AE and Link moved for a change of venue.<sup>FN2</sup> See Iowa R. Civ. P. 1.808(1). They sought to have the trial moved to Grundy County, where the accident occurred. The district court granted the motion.

FN2. The same law firm represents AE and Link. Although in the motion for a change of venue the firm only referenced AE, on appeal the parties appear to agree that both AE and Link sought the change of venue to Grundy County. We assume the same. The Barneys did not join in this motion until after filing their answer. *But see* Iowa R. Civ. P. 1.808(1) (requiring defendants to object to venue before filing answer).

At trial, the jury found in favor of the defendants. The Richards filed a motion for a new trial. They argued the district court should not have transferred the case to Grundy County. The district court denied the motion, and the Richards appealed.<sup>FN3</sup>

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FN3. After the case was transferred to Grundy County, AE and Link cross-petitioned against a number of third-party defendants. These defendants resisted the plaintiffs' motion for a new trial and are also parties to this appeal. *But see Cooley v. Ensign-Bickford Co.*, 209 N.W.2d 100, 101-02 (Iowa 1973) (third-party defendant ordinarily has no right to a change of venue to county of residence); *Mahaska County State Bank v. Crist*, 87 Iowa 415, 422-24, 54 N.W. 450, 452-53 (1893) (similar). We omit all further reference to them.

## II. Principles of Review

[1] "The scope of our review of a district court's ruling on a motion for new trial depends on the grounds raised in the motion." *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 859 (Iowa 2001). That is,

[t]o the extent the motion is based on a discretionary ground, we review it for an abuse of discretion. But if the motion is based on a legal question, our review is on error.

*Roling v. Daily*, 596 N.W.2d 72, 76 (Iowa 1999). The parties disagree about what standard of review should be applied. The disagreement stems from the fact that some motions for a change of venue require the district court to exercise its discretion, whereas others do not.

[2] For example, Iowa Rule of Civil Procedure 1.801(3) *permits* the district court to change the venue of a trial if the inhabitants of the county are prejudiced against the moving party. In a number of appeals concerning this and similar rules, we have reviewed for an abuse of discretion. *See, e.g., Peters ex rel. Peters v. Vander Kooi*, 494 N.W.2d 708, 711 (Iowa 1993) (reviewing district court's application of what is now rule 1.801); *see also* \*679 *State v. Evans*, 671 N.W.2d 720, 726 (Iowa

2003) (reviewing application of Iowa Rule of Criminal Procedure 2.11 to a claim of excessive pretrial publicity). In the case at bar, however, we are asked to assess the district court's grant of a motion for change of venue pursuant to Iowa Rule of Civil Procedure 1.808. Unlike rule 1.801, rule 1.808 *requires* the district court to move the case to another county if it was brought in the wrong county. *See* Iowa R. Civ. P. 1.808(1) (stating that the district court "shall" move the trial to a "proper" county). To determine whether or not the plaintiff filed suit in an improper place, the court only makes a legal determination based upon the venue provisions of Iowa Code chapter 616. *Slattery v. Iowa Dist. Ct.*, 442 N.W.2d 82, 84-85 (Iowa 1989). Rule 1.808 does not implicate the discretionary judgment of the district court. *Id.* Therefore our review in this case is for errors at law, not an abuse of discretion.

## III. The Merits

The primary issue is whether venue was proper in Johnson County. If venue was proper there, we assume the district court lacked authority to transfer the case elsewhere; when venue is proper in multiple counties, the plaintiff may choose where to file and the district court lacks the discretion to transfer the case pursuant to rule 1.808. *See id.*<sup>FN4</sup> If venue was not proper in Johnson County, we must decide whether it was proper in Grundy County. *Id.*

FN4. As in *Slattery*, the defendants in this case did not ask the court to move the trial for non-statutory reasons. 442 N.W.2d at 84.

To answer the foregoing questions, we must apply the various provisions of Iowa Code chapter 616. *Id.* We first analyze Iowa Code section 616.17, our general venue statute. We then consider two specific venue provisions, which the parties variously claim have applicability in this case.

### A. Iowa Code § 616.17

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[3][4] In Iowa, there is a long-standing preference for trying cases in the county of a defendant's residence. *Tull v. Honda Research & Dev., Ltd.*, 469 N.W.2d 683, 686 (Iowa 1991) (tracing preference back to 1851). Today this preference is found in Iowa Code section 616.17, our general venue statute. *See id.* That statute provides:

Personal actions, except as otherwise provided, must be brought in a county in which some of the defendants actually reside, but if neither of them have a residence in the state, they may be sued in any county in which either of them may be found.

Iowa Code § 616.17 (2001). Although renumbered several times over the years, the substance of the statute has remained unchanged for over a century. Compare Iowa Code § 2586 (1873), with Iowa Code § 616.17 (2001). Clearly, the present personal-injury lawsuit is a "personal action" for purposes of the statute. *See, e.g., Tull*, 469 N.W.2d at 686 (holding a negligence action arising out of an all-terrain vehicle accident was a "personal action"); *Baker v. Ryan*, 67 Iowa 708, 710, 25 N.W. 890, 890 (1885) (holding petition alleging negligence was a "personal action"). Here venue was proper in both Story and Polk counties because at least one defendant resided in each locale. Iowa Code § 616.17.

Having applied the general venue statute to the facts of this case, we now turn to examine two specific venue provisions the parties have brought to our attention, Iowa Code sections 616.18 and 616.8. We must determine whether they fit within the "except as otherwise provided" proviso in the general venue statute and also make venue \*680 proper in other counties. *Id.*; *see, e.g., Tull*, 469 N.W.2d at 686.

#### B. Iowa Code § 616.18

[5] In 1941, the legislature enacted a law permitting plaintiffs in motor vehicle accidents to sue in the county in which the injury was sustained. 1941 Iowa Acts ch. 298, § 1 (codified at Iowa Code §

616.18 (1946)). In 1972, the legislature broadened this special venue provision to plaintiffs in all personal-injury lawsuits. 1972 Iowa Acts ch. 1127, § 1 (codified at Iowa Code § 616.18 (1973)). We subsequently held Iowa Code section 616.18 falls within the "except as otherwise provided" proviso of Iowa Code section 616.17. *Tull*, 469 N.W.2d at 686. For this reason, the defendants are correct when they assert that venue in this case was not only proper in Polk and Story counties, the residences of various defendants, but also proper in Grundy County, the scene of the collision. Iowa Code § 616.18 (Iowa 2001); *see also Becker v. Wright*, 540 N.W.2d 250, 253 (Iowa 1995) (holding venue proper under Iowa Code section 616.17 where alleged injury was "triggered").

#### C. Iowa Code § 616.8

[6] To show venue was proper in Johnson County, the plaintiffs cite another special venue statute, Iowa Code section 616.8. Like our general venue statute, section 616.8, known as our common carrier statute, has also remained virtually unchanged for over a century. Compare Iowa Code § 2582 (1873), with Iowa Code § 616.8 (2001). It provides:

An action may be brought against any railway corporation, the owner of stages, or other line of coaches or cars, express, canal, steamboat and other river crafts, telegraph and telephone companies ... in any county through which such road or line passes or is operated.

Iowa Code § 616.8. Although not expressly mentioned, we have held that semi-trucks carrying freight on a fixed schedule over a regular route with fixed termini constitute a "line of ... cars" for purposes of the statute. *Bruce Transfer Co. v. Johnston*, 227 Iowa 50, 52-55, 287 N.W. 278, 278-81 (1939) (holding the fact legislature could not have foreseen rise of semi-trucks when it enacted common carrier statute in the nineteenth century did not foreclose an interpretation that would effectuate its intent).

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The Richards contend section 616.8, like section 616.18, falls within the “except as otherwise provided” language of section 616.17 and thereby authorized venue in Johnson County. Prior precedent holds otherwise. We were presented with similar facts and identical statutes in 1926 and held our common carrier statute did *not* fall within the exception to the general venue statute. For this reason, today we hold venue was not proper in Johnson County and affirm the district court.

### *Nickell I*

In *Nickell v. District Court* (“*Nickell I*”), the plaintiff was killed when his automobile collided with a train in Wayne County. 202 Iowa 408, 409, 210 N.W. 563, 563 (1926). His estate sued the railroad and its engineer in Clarke County. *Id.* The railroad was an Illinois corporation with its principal place of business in Illinois. *Id.* The engineer was a resident of Appanoose County. *Id.* The railroad had routes in Wayne, Clarke, and Appanoose Counties. *Id.*

The engineer filed a motion to change venue to Appanoose County. *Id.* The plaintiff resisted the motion. *Id.* The plaintiff claimed Iowa's common carrier statute fit within the “except otherwise provided” language of the general venue statute and therefore permitted him to sue both the railroad and the engineer anywhere\*681 the railroad had tracks in the state. *Id.* at 410, 210 N.W. at 563. It is important to note that notwithstanding the passage of time, the general venue and common carrier statutes in *Nickell I*, although renumbered, are *identical* to those in the case at bar. Compare Iowa Code §§ 11041, 11049 (1924), with Iowa Code §§ 616.8, .17 (2001).

The district court denied the engineer's motion, but on appeal we reversed. We held “the exception provided for in [the general venue statute] does not cover the conditions provided for in [the common carrier statute].” *Nickell I*, 202 Iowa at 411, 210 N.W. at 564. We further held that because the rail-

road was not a resident of Clarke County, the district court properly granted the engineer's motion for a change of venue to the county of his residence. *Id.*

Our holding in *Nickell I* was premised upon a distinction between suability and residence. *Id.* at 410-11, 210 N.W. at 563-64. Even though the common carrier statute rendered the railroad *suable* anywhere it had tracks, that did not make it a *resident* of all those counties for purposes of a codefendant Iowa resident's motion for a change of venue predicated upon the general venue statute. *Id.* That is, the mere fact the common carrier is suable in any county where its tracks run does not trump the right of other Iowa residents-defendants to have the trial held in a county where at least one of them resides. *See id.* In harmonizing the two statutes in this way, we emphasized that venue statutes are statutes of convenience and must be construed to effectuate the same. *See id.* at 411, 210 N.W. at 564 (noting “it was undoubtedly as convenient” for the railroad to have the case tried in Appanoose County as in Clarke County).

### *Nickell II*

We further explained and reaffirmed our holding in *Nickell I* the next year in *Hinchcliff v. Dist. Ct.*, 204 Iowa 470, 215 N.W. 605 (1927) (“*Nickell II*”), a subsequent appeal taken from the same case.<sup>FN5</sup> *See Recent Cases*, 13 Iowa L. Rev. 217, 230-31 (1928) (digesting *Nickell I* and *II*). After we decided *Nickell I*, on remand the district court ordered the entire case transferred to Appanoose County. *Nickell II*, 204 Iowa at 471, 215 N.W. at 605. The plaintiff objected. *Id.* Although the plaintiff admitted transfer of the case was proper as to the engineer, he resisted transfer of the railroad company. *Id.*

FN5. The parties here do not discuss *Nickell II*.

In *Nickell II*, we reaffirmed our holding in *Nickell I* and again ordered the entire case transferred to Ap-

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panoose County. *Id.* at 472-73, 215 N.W. at 605-06. In doing so, we further explained our reasoning in *Nickell I*. We reiterated transfer of the case *as to the engineer* was proper because of the distinction between suability and residence, i.e., the common carrier statute did not make the railroad a “resident” of Clarke County to satisfy the engineer’s right under the general venue statute to have the case tried where at least one Iowan-defendant resided. *See id.* The engineer was therefore entitled to have the case transferred to Appanoose County. As for the railroad company, we held that once it was determined the engineer was entitled to a transfer to Appanoose County, the entire case should be moved there for the sake of convenience. *See id.* (citing the principle that “[a] case should be, if possible, kept together, and find disposition on one trial” and noting it was equally convenient for the railroad to try the case in either venue).

When reading *Nickell I* and *II* together, it becomes manifest that it was the *engineer’s*<sup>682</sup> interest to be sued in his county of residence that controlled the analysis in *Nickell I*. Put simply, *Nickell I* held that Iowa Code section 616.8 does not fall within the “except as otherwise provided” proviso of section 616.18 when the plaintiff also sues other Iowa residents. *See also Halse v. La Crescent Grain Co.*, 231 Iowa 231, 235, 1 N.W.2d 202, 204 (1941) (adhering to *Nickell I* and *II* on analogous facts).

In light of *Nickell I* and *II*, it is clear in the case at bar that venue was not proper in Johnson County. AE was suable in Johnson County but not a resident thereof. Link was entitled to have the case moved to a proper venue. Iowa R. Civ. P. 1.808. As indicated, venue was proper in either Polk or Story counties, the counties wherein at least one defendant was resident, as well as Grundy County because the injury was allegedly sustained there. Iowa Code §§ 616.17, .18; *see also Tull*, 469 N.W.2d at 686. Therefore the district court did not err when it moved the entire case to Grundy County. Iowa Code § 616.18; *see Halse*, 231 Iowa at 235, 1 N.W.2d at 204; *Nickell II*, 204 Iowa at 472-73, 215

N.W. at 605-06; *Nickell I*, 202 Iowa at 411, 210 N.W. at 564.<sup>FN6</sup>

FN6. As in *Nickell II*, we expressly do not decide whether venue would have been proper in Johnson County had the plaintiffs only sued AE or had settled with Link. *See Nickell II*, 204 Iowa at 472, 215 N.W. at 606. There is some support for the view that it would be proper. *See Bruce Transfer*, 227 Iowa at 52-55, 287 N.W. at 278-81 (although not asked to decide its relationship with the general venue statute, holding under the common carrier statute that a common carrier-the sole defendant in the case-was not permitted a change of venue to its principal place of business); *see also The Distinction Between Suability and Residence in Venue Statutes*, 13 Iowa L.Rev. 212, 216 (1928) (opining that “[i]t is granted that if the railroad company had been sued alone, the venue would have been properly laid” in *Nickell I*).

#### Reaffirming Statutes of Convenience

[7] To overrule *Nickell I* and *II* after nearly eight decades would frustrate legislative intent in two respects. First, the legislature’s silence over the years is evidence of its tacit approval of our construction of the statutory framework. *State v. Anderson*, 517 N.W.2d 208, 214 (Iowa 1994); *accord* Ronald Dworkin, *Law’s Empire* 318-19 (1986) (“A statute owes its existence not only to the decision people made to enact it but also to the decision of other people later not to amend or repeal it.”). Second, it must be remembered that venue statutes are statutes of convenience, and to hold otherwise would promote inconvenience. *See Nickell I*, 202 Iowa at 411, 210 N.W. at 564. On this latter point, some further explanation of the common carrier statute is necessary.

As enacted, the common carrier statute both expanded and restricted venue for suits brought against



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common carriers. In each instance, however, the statute promoted convenience.

The common carrier statute expanded the venue options for plaintiffs suing a resident common carrier by itself. At the time, of course, there was not a special venue statute such as Iowa Code section 616.18 permitting plaintiffs to bring suit in the county where the injury occurred. Instead of forcing the plaintiff to sue the resident common carrier at its principal place of business, the plaintiff could sue it wherever its lines ran. See *Bruce Transfer*, 227 Iowa at 52, 287 N.W. at 280 ("The statute was apparently based upon the thought that the public interest and convenience would be promoted by permitting suits against common carriers in any county on their lines."). This was undoubtedly utilized by plaintiffs to file suit where the injury occurred, which, in turn, was likely \*683 to be where evidence, the witnesses, and possibly even the plaintiff resided.

The common carrier statute restricted venue for plaintiffs suing a nonresident common carrier by itself. In its absence, the general venue statute permitted plaintiffs to sue the common carrier anywhere it could "be found." Iowa Code § 11041 (1924) (now codified at Iowa Code § 616.18). Again, the common carrier statute promoted convenience because the common carrier

can more easily procure its witnesses, and carry on the process of the trial [when sued where its lines run] than if it were forced to defend in some remote corner of the state where one of its officers may be served, but where it does not carry on its business of transportation.

*The Distinction Between Suability and Residence in Venue Statutes*, 13 Iowa L. Rev. 212, 214 (1928); see, e.g., *Atchison, Topeka & Santa Fe Ry. v. Mershon*, 181 Iowa 892, 894, 165 N.W. 86, 87 (1917) (sanctioning change of venue pursuant to common carrier statute from a county in which one of the railroad's agents was served to a county in which it ran its lines).

The Richards would have us overrule our precedents and reinterpret chapter 616 to permit a plaintiff to sue any Iowa resident who happens to have a common carrier as a codefendant in the remotest parts of the state, even though the chosen venue had no connection with the case. This interpretation would clearly promote forum shopping and inconvenience, and thereby frustrate legislative intent. It would also foster injustice because it would encourage plaintiffs to sue defendants in inconvenient venues as leverage in the settlement process. We will not sanction an interpretation of chapter 616 that would permit a plaintiff to transform statutes of convenience into statutes of inconvenience.

[8] We are obligated to consider the common carrier statute *in pari materia* with other pertinent statutes. *Niles v. Iowa Dist. Ct.*, 683 N.W.2d 539, 541 (Iowa 2004). That is precisely what we did in *Nickell I* and *Nickell II*, when we held the common carrier statute does not fall within the exception to the general venue statute, at least with respect to a non-common carrier defendant. We adhere to those holdings today.

#### IV. Conclusion

Venue was proper in Polk, Story, and Grundy counties. The plaintiffs filed suit in Johnson County, which was not a proper venue. The district court rightly transferred the entire case to Grundy County.

#### AFFIRMED.

All justices concur except CARTER, J., who takes no part.

Iowa, 2005.

*Richards v. Anderson Erickson Dairy Co.*

699 N.W.2d 676

END OF DOCUMENT

**Westlaw Delivery Summary Report for CANNON,NED A**

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**KEYCITE****H** Richards v. Anderson Erickson Dairy Co., 699 N.W.2d 676 (Iowa Jul 08, 2005) (NO. 04-0644)**Citing References****Positive Cases (U.S.A.)****★★★ Discussed**

- C** 1 Froman v. Keokuk Health Systems, Inc., 755 N.W.2d 528, 529+ (Iowa Aug 29, 2008) (NO. 06-0667) " **HN: 7 (N.W.2d)**
- ▷** 2 Clinton Physical Therapy Services, P.C. v. John Deere Health Care, Inc., 714 N.W.2d 603, 609+ (Iowa May 12, 2006) (NO. 04-1893) " **HN: 1,2 (N.W.2d)**
- 3 McMic Finance Corp. v. Cycle Force Group, LLC, 2009 WL 627890, \*627890+ (Trial Order) (Iowa Dist. Jan 08, 2009) **Ruling on Defendants' Motion for Change of Venue** (NO. CL111108)

**★★ Cited**

- C** 4 Olson v. Sumpter, 728 N.W.2d 844, 848+ (Iowa Mar 16, 2007) (NO. 05-0161) " **HN: 1 (N.W.2d)**
- H** 5 Spreitzer v. Ross, 735 N.W.2d 204, 204+ (Iowa App. May 23, 2007) (Table, text in WESTLAW, NO. 06-0877) **HN: 1 (N.W.2d)**
- 6 State v. Farlow, 735 N.W.2d 203, 203 (Iowa App. May 09, 2007) (Table, text in WESTLAW, NO. 06-1776)
- ▷** 7 Cawthorn v. Catholic Health Initiatives Iowa Corp., 725 N.W.2d 658, 658 (Iowa App. Nov 16, 2006) (Table, text in WESTLAW, NO. 04-1724) **HN: 1 (N.W.2d)**
- 8 State v. Mitchell, 711 N.W.2d 733, 733 (Iowa App. Jan 19, 2006) (Table, text in WESTLAW, NO. 05-0126)
- 9 State v. Markus, 710 N.W.2d 545, 545 (Iowa App. Dec 21, 2005) (Table, text in WESTLAW, NO. 05-0155) **HN: 1 (N.W.2d)**
- 10 In re Taft, 710 N.W.2d 259, 259 (Iowa App. Dec 07, 2005) (Table, text in WESTLAW, NO. 05-0573) **HN: 2 (N.W.2d)**
- H** 11 McWane, Inc. v. Chevron U.S.A., Inc., 2008 WL 6334676, \*6334676 (Trial Order) (Iowa Dist. Aug 29, 2008) **Ruling on Defendants' First Motion for Summary Judgment** (NO. LALA074105)
- C** 12 Burke v. Lauz, 2005 WL 6190287, \*6190287+ (Trial Order) (Iowa Dist. Sep 14, 2005) **Ruling on Motion to Consolidate Cases** (NO. LA30705)
- H** 13 Burke v. Lauz, 2005 WL 6249701, \*6249701+ (Trial Order) (Iowa Dist. Sep 14, 2005) **Ruling on Motion to Consolidate Cases** (NO. 33223)

**Secondary Sources (U.S.A.)**

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**Trial Court Documents (U.S.A.)**

**Trial Motions, Memoranda and Affidavits**

36 Rebecca L. STOVIE, Plaintiffs, v. DSMIA, L.L.L.P. d/b/a Lyn Crossing Apartments, Defendants., 2007 WL 4620666, \*4620666 (Trial Motion, Memorandum and Affidavit) (Iowa Dist. Mar 29, 2007) **Reply to Defendants' Resistance to Plaintiff's Motion for New Trial** (NO. CL98419) ★ ★

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FILED

2009 OCT 6 PM 4 55

PATTY O. WEEKS  
CLERK OF THE DIST. COURT

DEPUTY

NED A. CANNON, ISB No. 2331  
SMITH & CANNON PLLC  
Attorney for Plaintiff  
508 Eighth Street  
Lewiston, Idaho 83501  
Telephone: (208) 743-9428  
Fax: (208) 746-8421

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendants.

Case No.: CV 09-00025

AFFIDAVIT OF NED A. CANNON IN  
PARTIAL OPPOSITION TO  
DEFENDANT'S MOTION FOR CHANGE  
OF VENUE

STATE OF IDAHO            )  
                                  ) ss:  
COUNTY OF NEZ PERCE    )

I, Ned A. Cannon, being first duly sworn on oath, deposes and says:

I am over the age of eighteen years, competent to testify in court, and make this  
Affidavit based upon my personal knowledge.

That attached hereto are true and accurate copies of the Idaho Vehicle Collision  
Report relating to the collision in this action that caused injury and property damage to  
Plaintiff.


That excluded from the attachment are the photos and photo logs associated with the Idaho State Police's investigation.

DATED: This 6<sup>th</sup> day of October, 2009.

  
Ned A. Cannon

SUBSCRIBED AND SWORN to before me this 6<sup>th</sup> day of October, 2009.



  
Notary Public for Idaho  
Residing at Lewiston therein.  
My commission expires: June 11, 2014

**CERTIFICATE OF SERVICE**

I, Ned A. Cannon, declare that, on the date indicated below, I served a true and correct copy of an *Affidavit of Ned A. Cannon in Partial Opposition to Defendant's Motion for Change of Venue* on Mallory Larson through her counsel via the method indicated below:

Sonyalee Nutsch  
Clements Brown & McNichols  
321 13th Street  
Lewiston, ID 83501

**Via:**

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email (pdf attachment)

Signed this 6<sup>th</sup> day of October, 2009, at Lewiston, Idaho.

  
Ned A. Cannon



COPY

## Idaho Vehicle Collision Report

ITD-90 5-95M 27-010500-0 Revised 11/29/96

 Agency Code **SP02** Officer # **2462** Report District **2** Case No. **L07000031** Page 1

Date of Collision <b>1/7/2007</b>	Day of Collision <b>Sunday (1)</b>	Time <b>12:43</b>	Police Dispatched <b>12:43</b>	Police Arrived <b>12:46</b>	EMS Dispatched <b>12:43</b>	EMS Arrived <b>13:06</b>	Location <b>2</b> Miles <input checked="" type="checkbox"/> N <input type="checkbox"/> E <input type="checkbox"/> IN City or Town <b>Cottonwood</b>
--------------------------------------	---------------------------------------	----------------------	-----------------------------------	--------------------------------	--------------------------------	-----------------------------	---

If Collision location is in: Intersection of 2 streets 1, 2	Complete Box # <b>1</b>	Name of Street <b>ON U.S. Highway 95</b>	<input type="checkbox"/> On Private Property	# of Lanes <b>2</b>	Posted Speed <b>65</b>	County <b>Idaho</b>	Interchange # <b>-U</b>
Intersection of Street and: Parking Lot / Driveway / Alley 1, 2, 3	<b>2</b>	In the Intersection with:			Posted Speed	R. R. Crossing # <b>-U</b>	Latitude (GPS)
Non-Intersection 1, 3	<b>3</b>	Outside an Intersection <b>0.7</b> <input checked="" type="checkbox"/> Miles <input type="checkbox"/> Feet <input checked="" type="checkbox"/> N <input type="checkbox"/> S <input type="checkbox"/> E <input type="checkbox"/> W <input type="checkbox"/> OF <b>MP 257</b>			Name of Cross Street or # of Ref. Mile Post Marker		Collision Loc Mile Point
						Longitude (GPS)	

<b>UNIT 1</b>	<input checked="" type="checkbox"/> Vehicle <input type="checkbox"/> Pedestrian <input type="checkbox"/> Pedalcyclist	Vehicle Owner Last First M.I. <b>Larson Mallory E</b>		Unit Type <b>6</b>
Driver Last First M.I. <b>Larson Mallory E</b>	Address <b>12877 Hartford Ave</b>		Unit Use <b>0</b>	
<input type="checkbox"/> Hit & Run	City <b>Orofino, ID</b>		Attach 1 <b>0</b>	
	Vehicle Year <b>2002</b>	Make (Dodge-Chev.) <b>Ford</b>	Model (Dart-Nova) <b>Focus</b>	Style (2 Dr.) <b>4 Door</b>
	Vehicle Color <b>Maroon</b>		License Plate No. <b>6C21888</b>	State <b>ID</b>
Driver's License No. <b>ID</b>	State <b>ID</b>	Idaho Code # / Violation <b>49-14013</b>	Vehicle Identification No. <b>[REDACTED]</b>	Est. Cost of Damage <b>12000</b>
Sex <b>F</b>	Date of Birth <b>[REDACTED]</b>	Prot Dev. <b>10</b>	Injury <b>B</b>	Ejection <b>1</b>
		Trapped <b>1</b>	Transported <b>1</b>	
Insurance <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		Carrier Name <b>Farm Bureau</b>		Policy Number <b>01-A-024225-01</b>

Passenger Names and Addresses (Unit 1 only, additional passengers on page 3)		Same Address as Driver	Seating	Sex	Date of Birth	Prot Dev.	Injury	Ejection	Trapped	Transported
Poe, Danielle R		<input type="checkbox"/>	<b>3</b>	<b>F</b>	<b>[REDACTED]</b>	<b>10</b>	<b>O</b>	<b>1</b>	<b>1</b>	<b>5</b>
		<input type="checkbox"/>								
		<input type="checkbox"/>								

<b>UNIT 2</b>	<input checked="" type="checkbox"/> Vehicle <input type="checkbox"/> Pedestrian <input type="checkbox"/> Pedalcyclist	Vehicle Owner Last First M.I. <b>Byrd Joe E</b>		Unit Type <b>6</b>
Driver Last First M.I. <b>Byrd Joe E</b>	Address <b>416 Elk Street</b>		Unit Use <b>0</b>	
<input type="checkbox"/> Hit & Run	City <b>Grangeville, ID</b>		Attach 1 <b>0</b>	
	Vehicle Year <b>1997</b>	Make (Dodge-Chev.) <b>Buick</b>	Model (Dart-Nova) <b>Skylark</b>	Style (2 Dr.) <b>4 Door</b>
	Vehicle Color <b>Green</b>		License Plate No. <b>I39868</b>	State <b>ID</b>
Vehicle Identification No. <b>[REDACTED]</b>	Est. Cost of Damage <b>10000</b>		Attach 2 <b>0</b>	
Sex <b>M</b>	Date of Birth <b>[REDACTED]</b>	Prot Dev. <b>7</b>	Injury <b>B</b>	Ejection <b>1</b>
		Trapped <b>1</b>	Transported <b>1</b>	
Insurance <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		Carrier Name <b>State Farm</b>		Policy Number <b>L03 7487-D07-12F</b>

Passenger Names and Addresses (Unit 2 only, additional passengers on page 3)		Same Address as Driver	Seating	Sex	Date of Birth	Prot Dev.	Injury	Ejection	Trapped	Transported
		<input type="checkbox"/>								
		<input type="checkbox"/>								
		<input type="checkbox"/>								

 Injured Transported To: **St. Marys Hospital - Cottonwood** By: **St. Marys Hospital Amb - Cottonwood**

<b>Front Seating</b> <table border="1"> <tr><td>1</td><td>2</td><td>3</td></tr> <tr><td>4</td><td>5</td><td>6</td></tr> <tr><td>7</td><td>8</td><td>10</td></tr> </table> Vehicle Motorcycle 14 Trailing Unit 15 Pedestrian 16 Pedalcycle Passenger Codes - Non Trailing Unit 11 Sleeper Sect.(Truck Cab) 12 Other enclosed Passngr./Cargo area 13 Unenclosed Passngr./Cargo area 15 Riding on Vehicle Exterior	1	2	3	4	5	6	7	8	10	<b>Protective Devices</b> 0 None 1 Shoulder Belt Only 2 Lap Belt Only 3 Shoulder & Lap 4 Child Safety Seat 5 Helmet Used 6 Nonmotorist Air Bag Equipped 7 Non-Activated Air Bag, Belts in Use 8 Non-Activated Air Bag, No Belts in Use 10 Air Bag Activated, Belts in Use 11 Air Bag Activated, No Belts in Use	<b>Injury</b> K Dead A Incapacitating B Non-Incapacitating C Possible 0 None Evident U Unknown Transferred For Medical Care By 1 Ambulance 2 Police Car 3 Helicopter 4 Private Vehicle 5 Not Transported	<b>Unit Type</b> 1 Pedestrian 2 Pedalcycle 3 Motorcycle 4 Moped 6 Car 8 Pickup with Camper 7 Pickup / Van / Panel / Sport Utility Vehicle 12 Equestrian 30 Farm Equipment (List) 40 Construction Equip. (List) 10 Motorhome 11 Snowmobile 5 ATV 28 Train 99 Other Non-Motor Veh. Commercial 15 Bus 21 Single Unit Truck - 2 axle/6 Tires 22 Single Unit Truck - 3 axle 23 Truck with Trailer 24 Bobtail 25 Tractor w/Semi Trailer 26 Tractor w/Double Trailer 27 Tractor w/Triple Trailer
1	2	3										
4	5	6										
7	8	10										
<b>Ejection</b> 1 Not Ejected 2 Totally Ejected 3 Partially Ejected T Thrown from cycle etc.	<b>Trapped</b> 1 Not Trapped 2 Trapped / Extrication unit used 3 Trapped / other extrication method	<b>Unit Use</b> 1 Police 2 Ambulance 3 Driver Trng. 4 Government 5 Taxi 6 Fire 7 Wrecker 8 School Bus	<b>Attachments</b> 1 Boat Trailer 2 Utility Trailer 3 Travel Trailer 4 Towed Vehicle 5 Mobile Home 9 Other									

Note: -U indicates Unknown

2462070110101647198556V200

104613

5	<b>Locality</b> 1 Business/Commercial    3 School/Playground    5 Agricultural    7 Residential 2 Industrial/Manufacturing    4 Recreational Area    6 Undeveloped	4
1	<b>Light Conditions</b> 1 Day    3 Dark - Street Lights On    5 Dark - No Street Lights 2 Dawn/Dusk    4 Dark - Street Lights Off	
2	<b>Weather Conditions - Two Selections Possible</b> 1 Clear    3 Rain    5 Sleet/Hail    7 Blowing Dust/Sand    A Smoke/Smog 2 Cloudy    4 Snow    6 Fog    8 Severe Cross Winds	1
3	<b>Road Surface Conditions</b> 1 Dry    3 Slush    5 Snow    7 Water 2 Wet    4 Ice    6 Mud    9 Other	5
0	<b>Other Road Conditions</b> 0 None    4 High/Low Shoulder    8 Flooded 1 Ruts/Bumps/Holes    5 Loose Gravel/Seal Coat    A Poor Pavement 2 Slick Asphalt (Bleeding)    6 Under Construction    Markings 3 Washboard    7 Lane Closed    9 Other	0
	<b>Officer #</b> 2462 <b>Case #</b> L07000031 <b>Road Type</b> 1 2-Way & Raised/Depressed Divider    5 Ramp 2 2-Way & 2-Way Left Turn Lane Divider    6 Alley 3 One-Way    7 Rest Area 4 2-Way & No Divider    8 Port of Entry A 2-Way & 2 Double Yellow Painted Divider    9 Other	4
	<b>Road Surface Type</b> 1 Concrete    2 Paved (Asphalt/Brick)    3 Gravel/Stone    4 Dirt	1
	<b>Roadway Geometrics</b> 1 Straight    2 Curve 1 Upgrade/Downgrade    3 Hillcrest    5 Level	5
	<b>Traffic Control</b> 0 None    4 Flashing Beacon    8 Officer/Flagger 1 Stop Sign    5 Traffic Signal-Ped. Only    A School Bus Signal 2 Yield    6 R. R. Gates/Signal    B No-Pass Barrier Line 3 Traffic Signal    7 R. R. Flashing Beacon    C Construction Signaling <b>SPECIFY</b> 1 Functioning    2 Not Functioning    3 Removed	0

22	<b>UNIT # 1 CONTRIBUTING CIRCUMSTANCES - 3 Possible</b> 0 None    5 Improper Lane Change    11 Improper Turn    17 Wheel Defect    22 Inattention    28 Improperly Parked 1 Exceeded Posted Speed    6 Following Too Close    12 Failed to Signal    18 Light Defect    23 Vision Obstruction    31 Previous Accident 2 Speed Too Fast    7 Drove Left of Center    13 Failed to Yield    19 Other Vehicle    24 Asleep/Drowsy    32 Distraction in/on Vehicle (List) for Conditions    8 Off Roadway / Over Corrected    14 Passed Stop Sign    25 Sick    35 Improper use of Turn Lane 3 Too Slow for Traffic    15 Disregarded Signal    21 Alcohol Impaired    26 Fatigued 4 Improper Overtaking    10 Improper Backing    16 Tire Defect    34 Drug Impaired    27 Physical Impairment    99 Other	0
16		0
0		0
0	<b>VISION OBSTRUCTION</b> 0 None    3 Roadway Slope/Snowbank    7 Bright Headlights    12 Splash/Spray from Other Vehicle    15 Traffic Sign 1 Curve in Road    4 Trees/Crop/Brush    8 Weather Conditions    16 Vehicle Stopped on Roadway    16 Billboard/Fence 2 Hill Crest    5 Reflection from Surface    10 Rain/Snow/Ice on Windows    13 Moving Vehicle    17 Building 6 Bright Sunlight    11 Cracked/Dirty Windows    14 Parked Vehicle    99 Other	0

1	<b>INITIAL Point of Impact</b> Auto / Motorcycle / Tractor with Semi Trailer 13 Top & Windows 14 Undercarriage	8
11	<b>POINT OF IMPACT</b> Trailing Unit #1 33 Top 34 Undercarriage	7
	Trailing Unit #2 53 Top 54 Undercarriage	7

6	<b>EXTENT OF DEFORMITY</b> 0 None    1 Very Minor    2 Minor    3 Minor/Moderate    4 Moderate    5 Moderate/Severe    6 Severe    7 Very Severe	4
---	---	---

Towed Due to Damage	Towed By: Dale's Towing	Towed By: C&B Towing	Towed Due to Damage
<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No			<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No

1	<b>Driver of UNIT # 1 ALCOHOL / DRUG INVOLVEMENT</b> 1 Neither Alcohol or Drugs Detected    2 Yes - Alcohol    3 Yes - Drugs    4 Yes - Both	1	
1	<b>Alcohol / Drug Test</b> 1 None Given    2 Test Refused    3 Blood Test    4 Urine Test    5 Breath Test    6 Field Test	1	
1		1	
BAC Test Results:    Drug Used (if known):    Drug Test Results    BAC Test Results:    Drug Used (if known):    Drug Test Results			

UNIT # 1	<b>COMMERCIAL VEHICLE</b> Refer to Instruction Sheet before completing	UNIT # 2		
	<b>Cargo Body</b> 1 Bus    2 Van/Enclosed Box    3 Cargo Tank    4 Flatbed    5 Dump    6 Concrete Mixer    7 Auto Transporter    8 Garbage/Refuse    9 Other    10 Pickup Bed			
# Axles	GVWR-Power	GVWR-All Trailers	ICC # For Load	DOT # For Load
Hazardous Material	Placard: <input type="checkbox"/> Yes <input type="checkbox"/> No	Spilled: <input type="checkbox"/> Yes <input type="checkbox"/> No	Haz-Mat #	
<b>Carrier Name &amp; ICC# or DOT# for Load obtained from...</b> 1 Shipping Papers    2 Vehicle Side    3 Driver    4 Log Book    9 Other				
(If Carrier different from Vehicle Owner)	Carrier Name	Address	City	State    Zip
(If Carrier different from Vehicle Owner)	Carrier Name	Address	City	State    Zip

Note: -U indicates Unknown

Event	Unit # of Units Involved	Event Location
10	1	1
72	1	1
53	1	2
10	2	1
72	2	1
53	2	4
10	4	1
5	4	3

# EVENTS - List events for ALL units in the order they occurred

Case No. **L07000031**

Page 3

- 1 Overturn
- 2 Separation of Units
- 3 Cargo Loss/Shift
- 4 Jack-Knifed
- 5 Ran off Road
- 6 Down Hill Runaway
- 7 Fire/Explosion
- 8 Gas/Inhalation
- 9 Other Noncollision
- 10 Loss of Control
- 11 Fell/Pushed/Jumped
- 12 Non-Collision Injury
- 13 Immersion
- 71 Came Back on Road
- 72 Drove L/R of Center

## One Veh. Collision With

- |                         |                              |                       |
|-------------------------|------------------------------|-----------------------|
| 14 Pedestrian           | 24 Bridge Rail               | 41 Culvert            |
| 15 Pedalcycle           | 25 Overpass                  | 42 Curb               |
| 16 Railroad Train       | 26 Guardrail Face            | 43 Ditch              |
| 17 Domestic Animal      | 27 Guardrail End             | 44 Embankment         |
| 18 Wild Animal          | 28 Median Barrier            | 45 Fence              |
| 19 Other Object         | 30 Highway Traffic Sign Post | 46 Mailbox            |
| 20 Parked Vehicle       | 31 Overhead Sign support     | 47 Tree               |
| on Private Property     | 32 Street Light Support      | 48 Building Wall      |
| 21 Impact Attenuator    | 33 Utility Pole              | 49 Other Fixed Object |
| 22 Bridge/Pier/Abutment | 39 Other Pole                |                       |
| 23 Bridge Parapet End   | 40 Delineator Post           |                       |

Sideswiped Same 52	Sideswiped Opposite 53	Angle 58
Turning Events		
Head-On 54	Angle 59	50 Head-On
Rear-End 56	Same Dir 62	51 Rear-End
		60 Backed Into
		61 Parked Veh.
		99 Other

## THE EVENT LOCATION

- |                  |                                |          |                           |
|------------------|--------------------------------|----------|---------------------------|
| 1 On Roadway     | 4 Roadside (Includes Sidewalk) | 7 Median | A In Parking Lot          |
| 2 Left Shoulder  | 5 Outside Right of Way         | 8 Gore   | B Parking Lot Access Road |
| 3 Right Shoulder | 6 Off Roadway - Loc Unknown    | 9 Other  | P Private Property        |

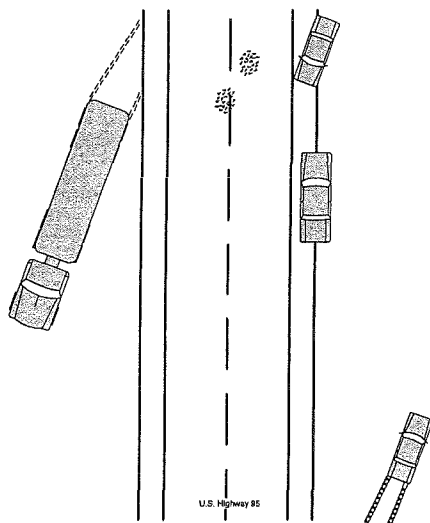
UNIT # 1

UNIT # 2

0	FIRST EVENT RELATIONSHIP TO JUNCTION								0
	0 Nonjunction	2 Intersection Related	4 Driveway/Alley Related	6 Ramp Related	8 Railroad Crossing Related				
	1 In Intersection	3 At Driveway/Alley	5 On Ramp	7 At Railroad Crossing	9 Other				

53	FIRST Harmful Event	GENERAL DIRECTION OF TRAVEL (If turning, select direction before turning)				53	FIRST Harmful Event
50	MOST Harmful Event	General Direction of Street <input checked="" type="checkbox"/> South / North <input type="checkbox"/> West / East	Unit Direction <input type="checkbox"/> North <input checked="" type="checkbox"/> South <input type="checkbox"/> East <input type="checkbox"/> West	General Direction of Street <input checked="" type="checkbox"/> South / North <input type="checkbox"/> West / East	Unit Direction <input checked="" type="checkbox"/> North <input type="checkbox"/> South <input type="checkbox"/> East <input type="checkbox"/> West	50	MOST Harmful Event
1	Driver / Ped Action	On Street U.S. Highway 95		On Street U.S. Highway 95		1	Driver / Ped Action

Sketch the scene



Not to Scale

## Driver Actions

- |                       |                                 |
|-----------------------|---------------------------------|
| 1 Going Straight      | 14 Starting in Traffic          |
| 2 Turning Right       | 15 Parking                      |
| 3 Right Turn on Red   | 16 Entering Drivwy./Alley       |
| 4 Turning Left        | 17 Leaving Drivwy./Alley        |
| 5 Left Turn on Red    | 18 Backing                      |
| 6 U-Turn              | 20 Avoiding Obstacle            |
| 7 Merging             | 21 Avoiding Veh./Ped.           |
| 8 Changing Lanes      | 22 Pursuing Vehicle             |
| 10 Passing            | 23 Fleeing Pursuit              |
| 11 Negotiating Curve  | 24 Racing                       |
| 12 Stopped in Traffic | 25 Parked Vehicle               |
| 13 Slowing in Traffic | 26 Driverless Vehicle in Motion |

## Pedestrian/Pedalcycle Actions

- |  |
|--|
| 30 Crossing at Painted Intersection      |
| 31 Crossing at Unpainted Intersection    |
| 35 Crossing at Non-Intersection X-walk   |
| 36 Crossing Not at Intersection          |
| 40 Walk/Ride with Traffic in Bike Lane   |
| 41 Walk/Ride with Traffic No Bike Lane   |
| 42 Walk/Ride Facing Traffic in Bike Lane |
| 43 Walk/Ride Facing Traffic No Bike Lane |
| 50 Standing on Roadway                   |
| 51 Playing on Roadway                    |
| 52 Working on Roadway                    |
| 60 Enter/Leave School Bus                |
| 70 Not on Roadway                        |
| 99 Other                                 |

Property Damage <b>None</b>	(Name of Object Struck - Owner Name and Address)	Estimated Damage \$
--------------------------------	--	------------------------

Narrative / Additional Information / Additional Passengers (indicate unit # and all information for additional passengers)

**NOTE: See addendum page for crash narrative.**

WITNESSES Name Address Home Phone Work Phone

X	Investigating Officer's Name and # <b>James Brouwer 2462</b>	Date of Report <b>1/10/2007</b>	Photos Y <input checked="" type="checkbox"/> N <input type="checkbox"/>	Approved By <b>bdoty</b>	Date <b>1 10 2007</b>
---	---	------------------------------------	--	-----------------------------	--------------------------

Send ORIGINAL to: Office of Highway Safety, P. O. Box 7129, Boise, Idaho 83707-1129

Note: -U indicates Unknown

Impact 2K 2.0.0

### Additional Units

ITD-90A 10-9-96  
27-010505-9

Pg 4

UNIT #3		CONTRIBUTING CIRCUMSTANCES - 3 Possible										UNIT #4	
0	0 None	5 Improper Lane Change	11 Improper Turn	17 Wheel Defect	22 Inattention	28 Improperly Parked	0						
0	1 Exceeded Posted Speed	6 Following Too Close	12 Failed to Signal	18 Light Defect	23 Vision Obstruction	31 Previous Accident	0						
0	2 Speed Too Fast for Conditions	7 Drove Left of Center	13 Failed to Yield	19 Other Vehicle Defect	24 Asleep/Drowsy	32 Distraction in/on Vehicle (List)	0						
	3 Too Slow for Traffic	8 Off Roadway / Over Corrected	14 Passed Stop Sign	21 Alcohol Impaired	25 Sick	35 Improper use of Turn Lane	0						
	4 Improper Overtaking	10 Improper Backing	16 Tire Defect	34 Drug Impaired	26 Fatigued	99 Other							
					27 Physical Impairment								
0	VISION OBSTRUCTION										0		
	0 None	3 Roadway Slope/Snowbank	7 Bright Headlights	12 Splash/Spray from Other Vehicle	15 Traffic Sign								
	1 Curve in Road	4 Trees/Crop/Brush	8 Weather Conditions	18 Vehicle Stopped on Roadway	16 Billboard/Fence								
	2 Hill Crest	5 Reflection from Surface	10 Rain/Snow/Ice on Windows	13 Moving Vehicle	17 Building								
		6 Bright Sunlight	11 Cracked/Dirty Windows	14 Parked Vehicle	99 Other								

<b>Front Seating</b> <table border="1"> <tr><td>1</td><td>2</td><td>3</td></tr> <tr><td>4</td><td>5</td><td>6</td></tr> <tr><td>7</td><td>8</td><td>10</td></tr> </table>			1	2	3	4	5	6	7	8	10	<b>Front Vehicle</b> <table border="1"> <tr><td>1</td></tr> <tr><td>4</td></tr> <tr><td>7</td></tr> </table>			1	4	7	<b>Motorcycle</b> <table border="1"> <tr><td>1</td></tr> <tr><td>4</td></tr> <tr><td>7</td></tr> </table>			1	4	7	<b>Protective Devices</b> 0 None 1 Shoulder Belt Only 2 Lap Belt Only 3 Shoulder & Lap 4 Child Safety Seat 5 Helmet Used 6 Nonmotorist 7 Non-Activated Air Bag, Belts in Use 8 Non-Activated Air Bag, No Belts in Use 10 Air Bag Activated, Belts in Use 11 Air Bag Activated, No Belts in Use			<b>Injury</b> K Dead A Incapacitating B Non-Incapacitating C Possible O None Evident U Unknown			<b>Unit Type</b> 1 Pedestrian 2 Pedalcycle 3 Motorcycle 4 Moped 6 Car 8 Pickup with Camper 7 Pickup / Van / Panel / Sport Utility Vehicle 12 Equestrian 30 Farm Equipment (List) 40 Construction Equip. (List) 10 Motorhome 11 Snowmobile 5 ATV 28 Train 99 Other Non-Motor Veh.		
1	2	3																														
4	5	6																														
7	8	10																														
1																																
4																																
7																																
1																																
4																																
7																																
14 Trailing Unit 16 Pedestrian Pedalcycle			18 Equestrian 99 Other U Unknown			<b>Air Bag Equipped</b> 7 Non-Activated Air Bag, Belts in Use 8 Non-Activated Air Bag, No Belts in Use 10 Air Bag Activated, Belts in Use 11 Air Bag Activated, No Belts in Use			<b>Transported For Medical Care By</b> 1 Ambulance 2 Police Car 3 Helicopter 4 Private Vehicle 5 Not Transported			<b>Commercial</b> 15 Bus 21 Single Unit Truck - 2 axle/6 Tires 22 Single Unit Truck - 3 axle 23 Truck with Trailer 24 Bobtail 25 Tractor w/Semi Trailer 26 Tractor w/Double Trailer 27 Tractor w/Triple Trailer																				
<b>Passenger Codes - Non Trailing Unit</b> 11 Sleeper Sect.(Truck Cab) 12 Other enclosed Passngr./Cargo area 13 Unenclosed Passngr./Cargo area 15 Riding on Vehicle Exterior			<b>Ejection</b> 1 Not Ejected 2 Totally Ejected 3 Partially Ejected T Thrown from cycle etc.			<b>Trapped</b> 1 Not Trapped 2 Trapped / Extrication unit used 3 Trapped / other extrication method			<b>Unit Use</b> 1 Police 2 Ambulance 3 Driver Trng. 4 Government 5 Taxi 6 Fire 7 Wrecker 8 School Bus			<b>Attachments</b> 1 Boat Trailer 2 Utility Trailer 3 Travel Trailer 4 Towed Vehicle 5 Mobile Home 9 Other																				

Note: -U indicates Unknown

## UNIT #3

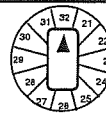
11 INITIAL  
Point of Impact11 PRINCIPLE  
Point of Impact

4

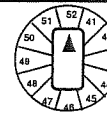
## POINT OF IMPACT

Auto / Motorcycle /  
Tractor with Semi Trailer13 Top & Windows  
14 Undercarriage

Trailing Unit #1

33 Top  
34 Undercarriage

Trailing Unit #2

53 Top  
54 UndercarriageINITIAL  
Point of ImpactPRINCIPLE  
Point of Impact

## UNIT #4

10

8

3

## EXTENT OF DEFORMITY

0 None 1 Very Minor 2 Minor 3 Minor/Moderate 4 Moderate 5 Moderate/Severe 6 Severe 7 Very Severe

Towed Due to Damage

☒ Yes ☐ No

Towed By:

Forest Towing

Towed By:

C&amp;B Towing

Towed Due to Damage

☒ Yes ☐ No

## Driver of UNIT #3

## ALCOHOL / DRUG INVOLVEMENT

## Driver of UNIT #4

1 1 Neither Alcohol or Drugs Detected 2 Yes - Alcohol 3 Yes - Drugs 4 Yes - Both 1

1 Alcohol Test

## Alcohol / Drug Test

1 None Given 2 Test Refused 3 Blood Test 4 Urine Test 5 Breath Test 6 Field Test

1 Drug Test

1 Alcohol Test

1 Drug Test

BAC Test Results:

Drug Used (if known):

Drug Test Results

BAC Test Results:

Drug Used (if known):

Drug Test Results

## UNIT #3

COMMERCIAL VEHICLE  
Refer to Instruction Sheet before completing

## UNIT #4

2 Cargo Body

1 Bus 2 Van/Enclosed Box 3 Cargo Tank 4 Flatbed 5 Dump 6 Concrete Mixer 7 Auto Transporter 8 Garbage/Refuse 9 Other 10 Pickup Bed

# Axles 5 GVWR-Power 50351 GVWR-All Trailers 68000 ICC # For Load 136818 DOT # For Load 54283

Hazardous Material Placard: ☐ Yes ☐ No Spilled: ☐ Yes ☐ No Haz-Mat #

# Axles GVWR-Power GVWR-All Trailers ICC # For Load DOT # For Load

Hazardous Material Placard: ☐ Yes ☐ No Spilled: ☐ Yes ☐ No Haz-Mat #

2 Carrier Name &amp; ICC# or DOT# for Load obtained from...

1 Shipping Papers 2 Vehicle Side 3 Driver 4 Log Book 9 Other

Carrier name is different from vehicle owner, record the name and address in the narrative on page 3.

Event	Unit # of Units Involved	Event Location
50	1 3	1
5	3	3
72	1	1

## EVENTS - List events for ALL units on page 3.

Use this area only for events which do not fit on page 3.

- Overtum
- Separation of Units
- Cargo Loss/Shift
- Jack-Knifed
- Ran off Road
- Down Hill Runaway
- Fire/Explosion
- Gas/Inhalation
- Other Noncollision
- Loss of Control
- Fell/Pushed/Jumped
- Non-Collision Injury
- Immersion
- Came Back on Road
- Drove L/R of Center

## One Veh. Collision With

- Pedestrian
- Pedalcycle
- Railroad Train
- Domestic Animal
- Wild Animal
- Other Object
- Not Fixed
- Parked Vehicle
- on Private Property
- Impact Attenuator
- Bridge/Pier/Abutment
- Bridge Parapet End

- Bridge Rail
- Overpass
- Guardrail Face
- Guardrail End
- Median Barrier
- Highway Traffic Sign Post
- Overhead Sign support
- Street Light Support
- Utility Pole
- Other Pole
- Delineator Post

## Culvert

- Curb
- Ditch
- Embankment
- Fence
- Mailbox
- Tree
- Building Wall
- Other Fixed Object

Sideswiped Same  
52Sideswiped Opposite  
53Angle  
58

## Turning Events

Head-On  
54Angle  
59Rear-End  
56Same Dir  
62

- Head-On
- Rear-End
- Backed Into
- Parked Veh.
- Other

## THE EVENT LOCATION

- On Roadway
- Left Shoulder
- Right Shoulder
- Roadside (Includes Sidewalk)
- Outside Right of Way
- Off Roadway - Loc Unknown
- Median
- Gore
- Other
- In Parking Lot
- Parking Lot Access Road
- Private Property

## UNIT #3

0 FIRST EVENT RELATIONSHIP TO JUNCTION

0 Nonjunction 1 In Intersection 2 Intersection Related 3 At Driveway/Alley 4 Driveway/Alley Related 5 On Ramp 6 Ramp Related 7 At Railroad Crossing 8 Railroad Crossing Related 9 Other

50 FIRST Harmful Event

50 MOST Harmful Event

1 Driver / Ped Action

## GENERAL DIRECTION OF TRAVEL

(If turning, select direction before turning)

General Direction of Street ☒ South / North Unit Direction ☒ North ☐ South☐ West / East ☐ East ☐ West

On Street U.S. Highway 95

General Direction of Street ☒ South / North Unit Direction ☐ North ☒ South☐ West / East ☐ East ☐ West

On Street U.S. Highway 95

FIRST Harmful Event

MOST Harmful Event

Driver / Ped Action

## UNIT #4

0

53

53

1

## Driver Actions

- Going Straight
- Turning Right
- Right Turn on Red
- Turning Left
- Left Turn on Red
- U-Turn
- Merging
- Changing Lanes
- Passing
- Negotiating Curve
- Stopped in Traffic
- Slowing in Traffic
- Starting in Traffic
- Parking
- Entering Drivwy./Alley
- Leaving Drivwy./Alley
- Backing
- Avoiding Obstacle

## Pedestrian/Pedalcycle Actions

- Avoiding Veh./Ped.
- Pursuing Vehicle
- Fleeing Pursuit
- Racing
- Parked Vehicle
- Driverless Vehicle in Motion
- Crossing at Painted Intersection
- Crossing at Unpainted Intersection
- Crossing at Non-Intersection X-walk
- Crossing Not at Intersection
- Walk/Ride with Traffic in Bike Lane
- Walk/Ride with Traffic No Bike Lane
- Walk/Ride Facing Traffic in Bike Lane
- Walk/Ride Facing Traffic No Bike Lane
- Standing on Roadway
- Playing on Roadway
- Working on Roadway
- Enter/Leave School Bus
- Not on Roadway
- Other

## Narrative / Additional Information / Additional Passengers:

Case No. L07000031

001 I, Corporal James Brouwer of the Idaho State Police, investigated a traffic  
002 crash on January 7, 2007. This was located two miles north of Cottonwood on  
003 U.S. Highway 95. The road surface was concrete with a layer of ice and slush on  
004 top. There were severe cross winds blowing from the west heading east across  
005 the road. The time was 1243 hours.

006 Four vehicles and 5 persons were involved in this incident. The first was a  
007 maroon Ford Focus driven by Mallory Larsen with Danielle Poe as her passenger.  
008 The second was a green Buick Skylark driven by Joe Byrd. The third was a White  
009 Volvo tractor-trailer combination driven by William Teurlings. The fourth was a  
010 white Honda S 2000 driven by Peter Molton.

011 Mallory Larsen was driving south traveling 65 miles per hour when she crested  
012 a hill and saw a slush covered portion of highway ahead of her. She said she  
013 slowed to about 45 miles per hour as she entered this area. There were also  
014 severe cross winds blowing at that location and her vehicle's tires lost  
015 traction on the slippery surface. Her car slid left of center and sideswiped a  
016 northbound car driven by Mr. Byrd. This impact caused a chain reaction  
017 resulting in a loss of control for Byrd who in turn sideswiped a southbound car  
018 driven by Mr. Molton. Larsen's vehicle continued sliding south in the  
019 northbound lane heading directly toward a northbound tractor-trailer  
020 combination driven by Mr. Teurling. Teurling took evasive action to the right  
021 to avoid a head-on crash but the left front of the Ford still struck the left  
022 front of the tractor.

023 I arrived at 1246 hours and quickly spoke with all involved parties. I updated  
024 the St. Mary's ambulance on the injuries and I helped the ambulance crew when  
025 they arrived. All but Mr. Molton were taken to St. Mary's Hospital for  
026 treatment. Two employees of the Idaho Transportation Department arrived and  
027 took over traffic control of the scene. Idaho State Police (ISP) Sgt. Brad Doty  
028 arrived and photographed the scene. ISP Trooper Ed Koopman measured and  
029 recorded the vehicle placement at the scene. ISP Trooper Josh Larsen  
030 interviewed all the persons involved at St. Mary's Hospital and obtained a  
031 written statement from each.

032 C&B Towing removed the Honda as a preference AAA call and the Buick Skylark as  
033 a non-preference call. Forest Towing removed the tractor-trailer as a  
034 preference call. Dale's Towing removed the Ford Focus as a non-preference call.  
035 I inventoried each vehicle prior to the tow trucks removing them.

036 I inspected the tread depth on the tires of the Ford Focus. I found 2/32nd  
037 tread on the left front, 3/32nd tread on the right rear, 4/32nd tread on the  
038 right front, and 9/32nd on the left rear. My training and experience in crash  
039 investigation indicated that tread depths that low are not safe for snow  
040 covered roads. The driver of a vehicle with tires worn that far would be  
041 placing others at risk on the highway. This risk was compounded by the severe  
042 cross winds that were blowing that day. I went to the hospital and cited  
043 Mallory Larsen for inattentive driving.

## Additional Commercial Vehicle Data For Unit 3:

044 Swift Transportation \* 9400 NW 10th St \* Oklahoma City, OK 73127



IDAHO STATE POLICE  
DRIVER STATEMENT

Case Number 0031

Name MALLOU E. LARSON Date of Birth 08-16-1985  
Address 11692 W. Trinity Ave. City ampa State ID Zip 83651  
Home Phone 208-703-4626 Work Phone 208-3361260 Other Phone \_\_\_\_\_  
Driver license State ID Driver License Number \_\_\_\_\_ SSN 519-33-5858  
What is your occupation? Food Service Officer Name of Employer Idaho Department of Corrections

Are you injured? yes If yes, where? Chest, Abrasions on hip  
Date and Time of crash Jan 7, 2007  
What road were you on? Hwy 95 What lane were you in? South  
What was your direction of travel? South How fast were you traveling? 65 slowed  
What is the posted speed limit? 65 How far were you behind the car in front of you? none  
Were you going straight, turning, or stopping? straight Was it daylight or dark? daylight  
Where were you sitting or standing at the time of the crash? driver  
Where were you looking just prior to the crash? straight ahead  
When did you realize the crash was going to happen? when it started to slide  
Have you taken any drugs, medication, or alcohol in the last 12 hours? NO  
If yes, what? \_\_\_\_\_ Before crash? \_\_\_\_\_ After Crash? \_\_\_\_\_  
Were you having any mechanical problems with your vehicle? NO If yes, what? \_\_\_\_\_  
Where did you begin your trip? Lewiston  
What was your destination? Boise  
How many hours had you been driving or traveling? less than 1 What was the weather like? Windy  
What were the road conditions like? Snow Patches Wet Road wet  
Were there other vehicles or pedestrians on the road at the time of the crash? yes How many? 2  
Where were the other vehicles? north lane  
Did anything obstruct your vision? NO If yes, describe obstruction(s) \_\_\_\_\_  
Did you brake? yes How hard? very little Did you accelerate? NO How hard? \_\_\_\_\_  
Did you make steering input? yes If yes, describe how right away from traffic

Make of the vehicle you were in? Ford Model of the vehicle you were in? Focus  
Year of vehicle 2002 Color of vehicle Red License Number & State? 6C21888  
Is this vehicle currently insured? yes If no, when did the insurance expire? \_\_\_\_\_  
Name of insurance company? Farm Policy number? \_\_\_\_\_  
Insurance expiration date? 7-07 Agent's Name \_\_\_\_\_ Phone # \_\_\_\_\_  
Are you wearing a seatbelt? yes Type of seatbelt (circle one) Shoulder/Lap Lap Only Shoulder Only  
Is your vehicle equipped with air bags? yes Did your air bags deploy? yes

COMPLETE THE BACK OF THIS PAGE



1  
the complete names and all persons in the vehicle, and all other requested information:

Driver <u>Mallory E Larson</u>	Sex <u>F</u>	Date of Birth <u>[REDACTED]</u>	Seatbelt/Childseat <u>          </u>
Front Middle <u>          </u>	Sex <u>          </u>	Date of Birth <u>          </u>	Seatbelt/Childseat <u>          </u>
Front Passenger <u>Danelle Pae</u>	Sex <u>F</u>	Date of Birth <u>          </u>	Seatbelt/Childseat <u>          </u>
Rear Behind Driver <u>          </u>	Sex <u>          </u>	Date of Birth <u>          </u>	Seatbelt/Childseat <u>          </u>
Rear Middle <u>          </u>	Sex <u>          </u>	Date of Birth <u>          </u>	Seatbelt/Childseat <u>          </u>
Rear Passenger <u>          </u>	Sex <u>          </u>	Date of Birth <u>          </u>	Seatbelt/Childseat <u>          </u>
3rd behind driver <u>          </u>	Sex <u>          </u>	Date of Birth <u>          </u>	Seatbelt/Childseat <u>          </u>
3rd Middle <u>          </u>	Sex <u>          </u>	Date of Birth <u>          </u>	Seatbelt/Childseat <u>          </u>
3rd Passenger <u>          </u>	Sex <u>          </u>	Date of Birth <u>          </u>	Seatbelt/Childseat <u>          </u>
Other <u>          </u>	Sex <u>          </u>	Date of Birth <u>          </u>	Seatbelt/Childseat <u>          </u>

Describe in your own words what happened: I was driving South on 95 in the South bound lane. Roads were somewhat patchy with a little bit of snow. I was traveling about 65 mph when I noticed the road ahead of me was covered in snow. I pressed on my breaks to try to slow down before I hit the patch of snow. I let off the breaks when I hit the snow but my car started to slide into the north bound lane. I tried to turn towards the South bound lane because vehicles were coming. I hit a green vehical on their driver side which spun me sideways. I then saw a white swift truck coming toward me. I do not remember what happened until I came to a stop.

What could you have done to avoid this crash? I don't think there is anything I could have done

This statement is true and correct, and I acknowledge that penalty under law flows for my prosecution for filing a false report to the police.

Signed Mallory E Larson

Date 1-7-07



# IDAHO STATE POLICE PASSENGER STATEMENT

Case Number 0031

Collision Statement Unit # 1

Name Danielle R. Poe Birth Date [REDACTED]

Address [REDACTED]

City [REDACTED] State Id. ZIP 83705

Home Phone [REDACTED] Work Phone [REDACTED]

Date/Time of Crash 1-7-07 Location of Crash: Hwy 95

Describe the vehicle you were in: Year: \_\_\_\_\_ Make: Ford Model Focus

Color: Red License #: \_\_\_\_\_ License State \_\_\_\_\_

Where were you sitting or standing at the time of the crash: Front Pass.

How many hours had you been traveling 1 hr.

Where did you begin your trip Lewiston

What was your destination Boise

What road were you on: 95 What was the speed limit: 65 What lane were you in SB

How fast was the vehicle going: 60 What were the road conditions clear / slushy

What were the weather conditions cloudy

What were the lighting conditions light

What was the driver doing, describe: steering

Were there other vehicles around you: yes How heavy was traffic: moderate

What was the distance between you and the vehicle in front of you Don't remember

Did you have a seat belt on: yes Lap or Chest and Shoulder Did an airbag go off for you yes

Did you receive any injuries from the crash: yes Please describe the injuries: Neck Bruise

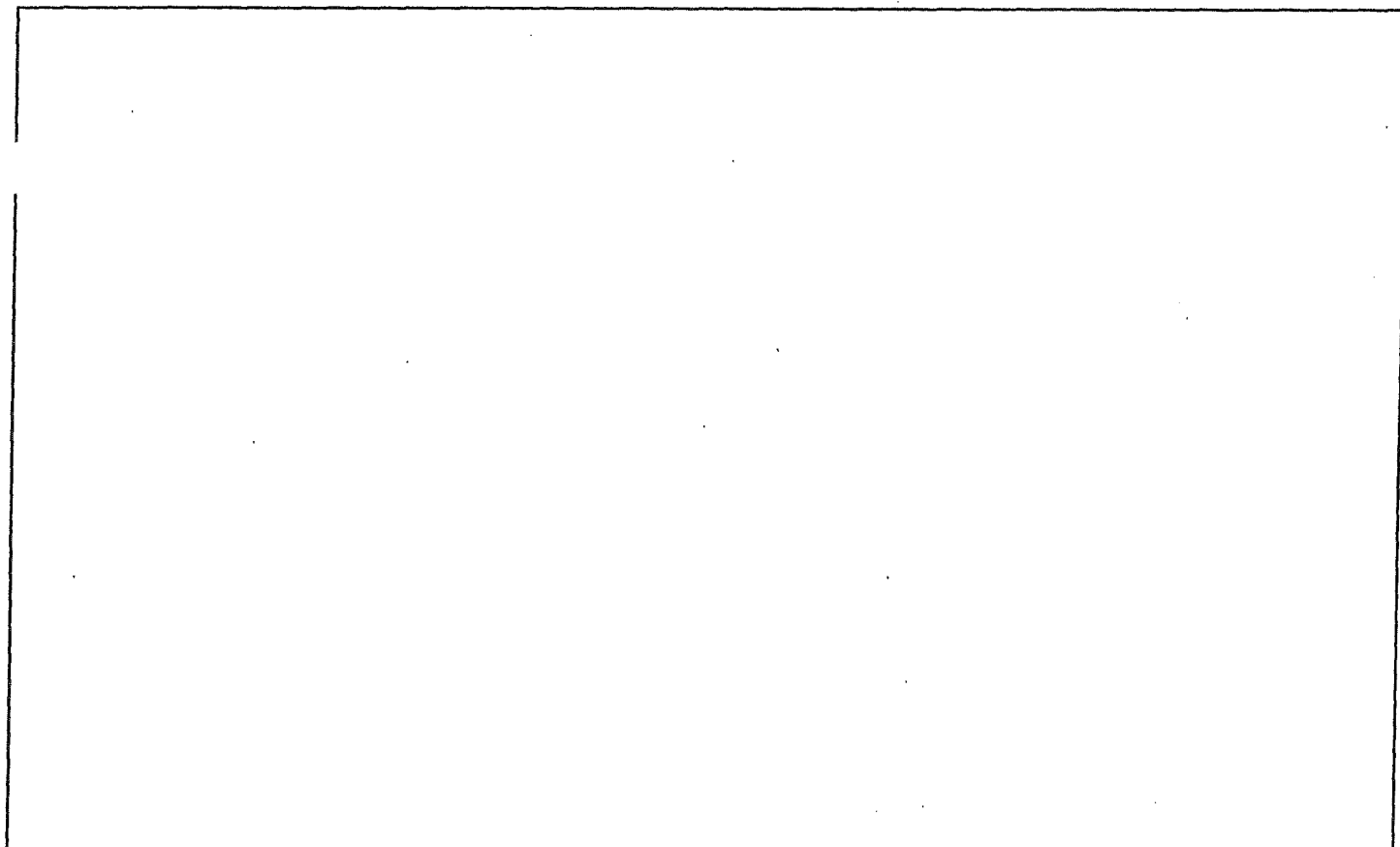
When did you realize a crash was going to happen, describe: Started sliding

COMPLETE THE BACK OF THIS PAGE

Please describe the events leading up to the crash, the crash itself, and what happened after the crash had occurred

Driving down Road hit slush hit rear end of car  
and then hit semi

Please do a sketch of the crash scene:



**This statement is true and correct, and I acknowledge that penalty under law allows for my prosecution for filing a false report to the police.**

Signed

*Parvella R. Per*

Date

*1-7-07*



IDAHO STATE POLICE  
DRIVER STATEMENT

Case Number 0031

Name Joe E. Byrd Date of Birth [REDACTED]  
Address 416 Elk St. City GRANGERVILLE State ID Zip 83330  
Home Phone 983-3801 Work Phone \_\_\_\_\_ Other Phone \_\_\_\_\_  
Driver license State \_\_\_\_\_ Driver License Number \_\_\_\_\_ SSN \_\_\_\_\_  
What is your occupation? \_\_\_\_\_ Name of Employer \_\_\_\_\_

Are you injured? Yes If yes, where? L Ribs + Shoulder  
Date and Time of crash 12:30 P.M. 1-7-07  
What road were you on? 95 What lane were you in? North  
What was your direction of travel? \_\_\_\_\_ How fast were you traveling? 55  
What is the posted speed limit? \_\_\_\_\_ How far were you behind the car in front of you? \_\_\_\_\_  
Were you going straight, turning, or stopping? STRAIGHT Was it daylight or dark? DAY  
Where were you sitting or standing at the time of the crash? DRIVER  
Where were you looking just prior to the crash? Saw car sliding straight ahead  
When did you realize the crash was going to happen? \_\_\_\_\_  
Have you taken any drugs, medication, or alcohol in the last 12 hours? NO  
If yes, what? \_\_\_\_\_ Before crash? NO After Crash? \_\_\_\_\_  
Were you having any mechanical problems with your vehicle? \_\_\_\_\_ If yes, what? \_\_\_\_\_  
Where did you begin your trip? GRANGERVILLE  
What was your destination? Terdenum  
How many hours had you been driving or traveling? \_\_\_\_\_ What was the weather like? Windy  
What were the road conditions like? SOME SLUSH  
Were there other vehicles or pedestrians on the road at the time of the crash? YES How many? \_\_\_\_\_  
Where were the other vehicles? South  
Did anything obstruct your vision? NO If yes, describe obstruction(s) \_\_\_\_\_  
Did you brake? NO How hard? \_\_\_\_\_ Did you accelerate? YES How hard? NOT VERY HARD  
Did you make steering input? NO If yes, describe how \_\_\_\_\_

Make of the vehicle you were in? BUICK Model of the vehicle you were in? SKYLARK  
Year of vehicle 1997 Color of vehicle GREEN License Number & State? \_\_\_\_\_  
Is this vehicle currently insured? YES If no, when did the insurance expire? \_\_\_\_\_  
Name of insurance company? STATE FARM Policy number? \_\_\_\_\_  
Insurance expiration date? \_\_\_\_\_ Agent's Name Allen Willis Phone # \_\_\_\_\_  
Were you wearing a seatbelt? YES Type of seatbelt (circle one) Shoulder/Lap Lap Only Shoulder Only  
Is your vehicle equipped with air bags? YES Did your air bags deploy? NO

COMPLETE THE BACK OF THIS PAGE

List the complete names and all persons in the vehicle, and all other requested information:

Driver _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
Front Middle _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
Front Passenger _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
Rear Behind Driver _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
Rear Middle _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
Rear Passenger _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
3rd behind driver _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
3rd Middle _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
3rd Passenger _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
Other _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____

Describe in your own words what happened: I was going North Bound saw red  
car slid into N. Lane hit me on Lt side  
spun me around 50. I was facing South I then  
pulled off the road. I didn't hit nobody.  
I was going 55 mph.

As told to Tpl. Larsen  
signed x Joe E. Byrd

What could you have done to avoid this crash? \_\_\_\_\_

his statement is true and correct, and I acknowledge that penalty under law  
allows for my prosecution for filing a false report to the police.

igned \_\_\_\_\_

Joe E. Byrd

Date \_\_\_\_\_

1-7-07

# IDAHO STATE POLICE TRAFFIC CRASH STATEMENT



DATE 1-7-07

0031

X DRIVER \_\_\_\_\_ PASSENGER - Where were you seated in the vehicle? \_\_\_\_\_

Were you wearing a seatbelt? \_\_\_\_\_

CELLULAR TELEPHONE # 559 312-3349

NAME: William P m Teulings HOME TELEPHONE # \_\_\_\_\_

ADDRESS: 6239 North Brix Ave. Fresno, Ca. 93722

DATE OF BIRTH: 4-21-62 DATE & TIME OF CRASH: 1-7-07 1245

Are you injured? yes If so, where? Head, neck, back, chest, fractured R. leg

Have you taken any drugs, medication or alcohol in the last 12 hours? No

If so, what? BEFORE THE CRASH \_\_\_\_\_ AFTER THE CRASH \_\_\_\_\_

What is your occupation? Truck driver Work Telephone # \_\_\_\_\_

Name and Address of Employer? Swift

Where were you at the time of the crash? Rt. Lane (Northbound)

What road were you on? 95 Direction of Travel? North

Were you going (circle one) straight turning left turning right stopping stopped in traffic.

How fast were you traveling? 35 What is the Speed Limit? 65

Where were you looking just prior to the crash? approaching car

When did you realize the crash was going to happen? when she hit the other car

Did you try to avoid the crash? yes How? Go to Rt. side and braking

Who else was with you at the time of the crash? No

Make of the vehicle you were in: Volvo

How many hours had you driven this trip? 5 hours

Any mechanical problems with the vehicle? None

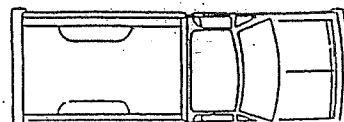
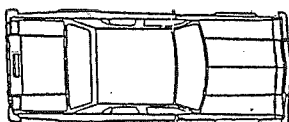
Were there other vehicles or pedestrians on the road at the time of the crash? yes

Was it daylight or dark? Day What was the weather like? Windy

Were there vision obstructions? None If so, what? \_\_\_\_\_

Road Conditions? Windy / blowing snow

Mark where the damage occurred on the diagram.





Describe in your own words what happened or what you saw.

Driving North one car in front of me. Saw a car  
slid into North Lane. Car in front went to  
right. Sliding car hit car in front of me.  
I braked hard and went off to the right. We  
hit sliding car left side to left side. I went  
off road and came to a stop.

Signed: As told to Tpr. Larsen

Date: 1-7-07

Drawing of Crash Scene:





IDAHO STATE POLICE  
DRIVER STATEMENT

Case Number

0031

Name Peter M. Molton Date of Birth [REDACTED]  
Address 237 Lakewood Dr City Barbur State WA Zip 99323  
Home Phone 509-542-9220 Work Phone            Other Phone 509-366-3403  
Driver license State WA Driver License Number MOLTONM571N SSN [REDACTED]  
What is your occupation? Retired Name of Employer N/A

Are you injured? Yes If yes, where? Bruise, left wrist

Date and Time of crash 1/07/07 1 pm

What road were you on? US Hwy 95 What lane were you in? Southbound

What was your direction of travel? South How fast were you traveling? 65

What is the posted speed limit? 65 How far were you behind the car in front of you? 1 mile

Were you going straight, turning, or stopping? Straight Was it daylight or dark? Day

Where were you sitting or standing at the time of the crash? No

Where were you looking just prior to the crash? Ahead

When did you realize the crash was going to happen? Car spinning towards me in my lane

Have you taken any drugs, medication, or alcohol in the last 12 hours? No

If yes, what?            Before crash?            After Crash?           

Were you having any mechanical problems with your vehicle? No If yes, what?           

Where did you begin your trip? Spokane

What was your destination? Yuma

How many hours had you been driving or traveling? 1-2 What was the weather like? Poor

What were the road conditions like? Some snow / slush, mostly wet

Were there other vehicles or pedestrians on the road at the time of the crash? Yes How many? Several wrecks

Where were the other vehicles? Ahead

Did anything obstruct your vision? No If yes, describe obstruction(s)           

Did you brake? No How hard?            Did you accelerate? No How hard?           

Did you make steering input? Yes If yes, describe how Swerve to right

Make of the vehicle you were in? Honda Model of the vehicle you were in? S2000

Year of vehicle 2005 Color of vehicle white License Number & State? 612 TX4 WA

Is this vehicle currently insured? Yes If no, when did the insurance expire?           

Name of insurance company? Farmers Policy number? CA 0692269

Insurance expiration date? 11-29-07 Agent's Name            Phone #           

Are you wearing a seatbelt? Yes Type of seatbelt (circle one) Shoulder/Lap Lap Only Shoulder Only

Is your vehicle equipped with air bags? Yes Did your air bags deploy? Yes

COMPLETE THE BACK OF THIS PAGE

List the complete names and all persons in the vehicle, and all other requested information:

Driver <u>Peter Michael Molten</u>	Sex <u>M</u>	Date of Birth <u>[REDACTED]</u>	<u>✓</u> Seatbelt/Childseat
Front Middle _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
Front Passenger _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
Rear Behind Driver _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
Rear Middle _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
Rear Passenger _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
3rd behind driver _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
3rd Middle _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
3rd Passenger _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
Other _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____

Describe in your own words what happened:

Going S on Hwy 95, red car spun out of control & into my  
lane. Tried to avoid by swerving into ditch, could not.  
Side of my car wrecked, both air bags deployed.

What could you have done to avoid this crash?

Nothing

This statement is true and correct, and I acknowledge that penalty under law  
applies for my prosecution for filing a false report to the police.

Signed

Peter M. Molten

Date

11-7-07



# IDAHO STATE POLICE DRIVER STATEMENT

Case Number 0031

Id. No.

Name Danielle R. Poe Date of Birth [REDACTED]  
Address 3805 West Grover City Boise State Id. Zip 83705  
Home Phone (208) 353-5770 Work Phone  Other Phone   
Driver license State Id. Driver License Number  SSN [REDACTED]  
What is your occupation? E-2 Name of Employer National Guard

Are you injured? yes If yes, where? Neck, Back, Fingers  
Date and Time of crash 1-7-07  
What road were you on? 95 What lane were you in? S8  
What was your direction of travel? South How fast were you traveling?   
What is the posted speed limit?  How far were you behind the car in front of you?   
Were you going straight, turning, or stopping?  Was it daylight or dark?   
Where were you sitting or standing at the time of the crash?   
Where were you looking just prior to the crash?   
When did you realize the crash was going to happen?

ave you taken any drugs, medication, or alcohol in the last 12 hours?   
If yes, what?  Before crash?  After Crash?   
Were you having any mechanical problems with your vehicle?  If yes, what?   
Where did you begin your trip? Malden  
What was your destination? Lewiston  
How many hours had you been driving or traveling?  What was the weather like?   
What were the road conditions like?   
Were there other vehicles or pedestrians on the road at the time of the crash?  How many?   
Where were the other vehicles?   
Did anything obstruct your vision?  If yes, describe obstruction(s)   
Did you brake? yes How hard? fully Did you accelerate? no How hard?   
Did you make steering input? yes If yes, describe how To the right

Make of the vehicle you were in?  Model of the vehicle you were in?   
Year of vehicle  Color of vehicle  License Number & State?   
Is this vehicle currently insured?  If no, when did the insurance expire?   
Name of insurance company?  Policy number?   
Insurance expiration date?  Agent's Name  Phone #   
Are you wearing a seatbelt?  Type of seatbelt (circle one) Shoulder/Lap Lap Only  Shoulder Only   
Is your vehicle equipped with air bags? yes Did your air bags deploy? no

COMPLETE THE BACK OF THIS PAGE

st the complete names and all persons in the vehicle, and all other requested information:

Driver _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
Front Middle _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
Front Passenger _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
Rear Behind Driver _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
Rear Middle _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
Rear Passenger _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
3rd behind driver _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
3rd Middle _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
3rd Passenger _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____
Other _____	Sex _____	Date of Birth _____	Seatbelt/Childseat _____

Describe in your own words what happened: \_\_\_\_\_

What could you have done to avoid this crash? \_\_\_\_\_

This statement is true and correct, and I acknowledge that penalty under law allows for my prosecution for filing a false report to the police.

Signed \_\_\_\_\_ Date \_\_\_\_\_ 77



STATE

POLICE

## Witness Statement

0031

Date 1/07/07 Time 1:20pm ☐ am ☒ Traffic Accident  
Type of Incident ☐ Other \_\_\_\_\_

Name Peter Molton Age 63 Sex M

Address 227 Lakewood Dr. City Burien State WA

Telephone # Home 509.542.9220 Work \_\_\_\_\_ Other \_\_\_\_\_  
cell " 366.3403

Describe what you saw, heard or know of this incident:

Driving S on Hwy 95 just past Ferdinand when a red car out of control & traveling N spun across on ice & slush. Spun into my Honda S2000 even after I took evasive action into ditch. Major damage to side of car, undrivable, both air bags inflated. Time about 1:00pm 1/7/07.

Signature Peter M Molton



Ins Farm Bureau Mutual

01-A-024225-01

7-9-06 to 7-9-07

IDAHO STATE POLICE

TOWED VEHICLE INVENTORY/N ICE

Date 1-7-2007 Time 1434Location: US Hwy 95 Milepost 259Case No. LO7000031Reason for Towing: Driver Arrest ☐ Abandoned ☐ Traffic Hazard ☐ Accident ☒ Private Property ☐  
Extraordinary Circumstances ☐ (Specify): \_\_\_\_\_Registered Owner: Mallory LarsonAddress: 12877 Hartford Ave Orofino IDDriver: SameAddress: 03544Lien Holder: NONE

Address: \_\_\_\_\_

Vehicle: Color Maroon Year 2002Make Ford Focus Body 4 door SedanState & License # Idaho GC 21888V.I.N. 1FADP34P42W104782

Odometer Reading: \_\_\_\_\_

Vehicle Locked? ☐ Yes ☐ NoBody Damage: Entire front half of car destroyedContents: 1 black duffel bag, 1 box, misc packages  
Vehicle locked

Yes No

Radio ☒ ☐Tape Deck/CD ☒ ☐Spare Tire ☐ ☐Glove Box Locked ☐ ☐Other (See attached) ☐ ☐

Vehicle/contents taken

to: Grangeville

(Physical location)

by: Dales Towing

(Towing company name or other authorized person)

Phone: 983-I certify that the items above were released to my custody by: Cpl Jim Browner

(Officer's Name)

X

(Signature of towing company employee or other authorized person receiving vehicle and contents)

There are no "HOLDS" on this vehicle.

Items retained by Officer? ☒ None ☐ Yes, describe ALL: \_\_\_\_\_

## COMPLETE NOTICE BELOW FOR ABANDONED VEHICLES ONLY

## NOTICE

The described vehicle has been towed and is subject to sale in compliance with Title 49, Chapter 18, Idaho Code. YOU MAY, AT ANY TIME PRIOR TO THE SALE OR PERMANENT DISPOSAL, RECLAIM YOUR VEHICLE BY PAYING THE POSSESSORY LIEN AGAINST THE VEHICLE WHICH CONSISTS OF THE AMOUNT OF THE TOWING AND STORAGE.

- [ ] You are entitled to a post-storage hearing to determine the validity of the towing and storage charges. In order to receive a post-storage hearing, owners or their agents must request the hearing in writing within ten (10) days of the date of this notice to the agency authorizing the tow. Any such hearing will be conducted within 48 hours of request, excluding weekends and holidays. There is a possessory lien against this vehicle in the amount of \$ \_\_\_\_\_ (towing) and storage which will accrue at the rate of \$ \_\_\_\_\_ for each day the vehicle is stored.
- [ ] The value of the vehicle has been appraised at LESS than \$200. You have the right to a hearing in court if the "Declaration of Opposition" (form enclosed is signed and returned to Idaho State Police, \_\_\_\_\_, within ten (10) days of the date this notice was mailed. If a "Declaration of Opposition" is not received within this time, the possessory lien holder may dispose of the vehicle.
- [ ] The value of this vehicle has been appraised at MORE than \$200. Storage may be charged for a maximum number of sixty (60) days. If your vehicle is not claimed prior to \_\_\_\_\_ (60 days from date above), it will be sold.

Vehicle released to \_\_\_\_\_

Date \_\_\_\_\_

Contents released to \_\_\_\_\_

Date \_\_\_\_\_

Copy Distribution: WHITE - Regional Office, YELLOW - ITD Titles Section, PINK - Registered Owner/Lienholder, GOLDENROD - Wrecker Operator

EH 06-05-01

rev. 7/04



State Farm Insurance

Policy 203 7487-D .12F

IDAHO STATE POLICE

TOWED VEHICLE INVENTORY/N. CE

Oct 7 '06 to Apr 7 '07 Date 1-7-2007 Time 1420

Location: US Hwy 95 Milepost 257

Case No. 207000031

Reason for Towing: Driver Arrest ☐ Abandoned ☐ Traffic Hazard ☐ Accident ☒ Private Property ☐Extraordinary Circumstances ☐ (Specify):

Registered Owner: Joe Byrd

Address: 416 Elk St Grangeville Idaho

Driver: Joe Byrd

Address:

Lien Holder: Petalatch #1 Federal credit union

Address: PO 497 Lewiston ID 83506

Vehicle: Color Green Year 1997

Make Buick Skylark Body 4dr Sedan

State &amp; License # Idaho I 39868

V.I.N. 1G4NJ52M1VC455019

Odometer Reading:

Vehicle Locked? ☐ Yes ☒ No

Body Damage: Drivers side &amp; entire rear destroyed

Contents: 2 pair of glasses

Yes No

Radio ☐ ☐Tape Deck/CD ☐ ☐Spare Tire ☐ ☐Glove Box Locked ☐ ☐Other (See attached) ☐ ☐

Vehicle/contents taken

to: 1100 North B Street Grangeville ID 83530

(Physical location)

by:

Phone:

(Towing company name or other authorized person)

I certify that the items above were released to my custody by:

(Officer's Name)

X

(Signature of towing company employee or other authorized person receiving vehicle and contents)

There are no "HOLDS" on this vehicle.

Items retained by Officer? ☒ None ☐ Yes, describe ALL:

All bags not deployed

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[ ] The value of the vehicle has been appraised at LESS than \$200. You have the right to a hearing in court if the "Declaration of Opposition" (form enclosed is signed and returned to Idaho State Police, \_\_\_\_\_, within ten (10) days of the date this notice was mailed. If a "Declaration of Opposition" is not received within this time, the possessory lien holder may dispose of the vehicle.

[ ] The value of this vehicle has been appraised at MORE than \$200. Storage may be charged for a maximum number of sixty (60) days. If your vehicle is not claimed prior to \_\_\_\_\_ (60 days from date above), it will be sold.

Vehicle released to

Date

Contents released to

Date

Copy Distribution: WHITE - Regional Office, YELLOW - ITD Titles Section, PINK - Registered Owner/Lienholder, GOLDENROD - Wrecker Operator

EH 06-05-01

Rev. 7/04





IDAHO STATE POLICE  
TOWED VEHICLE INVENTORY/NOTICE  
Date 1-7-2007 Time 1600

Location: US Hwy 95 milepost 257 Case No. 207000031  
Reason for Towing: Driver Arrest ☐ Abandoned ☐ Traffic Hazard ☐ Accident ☒ Private Property ☐  
Extraordinary Circumstances ☐ (Specify): \_\_\_\_\_

Registered Owner: Swift Transportation Address: 9400 NW 10th St  
Driver: William Teulings Address: 6234 N Brix Fresno CA 93722  
Lien Holder: Sparks Finance Co Address: PO Box 29243 Phoenix AZ 85038

Vehicle: Color white Year 2006 Make Volvo Body Truck Tractor  
State & License # OK 2JL363 V.I.N. 4V4NC9T697 N436034  
Odometer Reading: \_\_\_\_\_ Vehicle Locked? ☐ Yes ☒ No  
Body Damage: \_\_\_\_\_

Contents: <u>Qualcomm, TV, 1 nylon duffel bag containing clothing</u>	Yes	No
<u>1 green sleeping bag, 1 blue nylon bag containing clothing</u>	Radio <input checked="" type="checkbox"/>	<input type="checkbox"/>
<u>CB radio</u>	Tape Deck/CD <input checked="" type="checkbox"/>	<input type="checkbox"/>
	Spare Tire <input type="checkbox"/>	<input type="checkbox"/>
	Glove Box Locked <input type="checkbox"/>	<input type="checkbox"/>
	Other (See attached) <input type="checkbox"/>	<input type="checkbox"/>

Vehicle/contents taken to: Lewiston  
(Physical location)  
by: Forest Towing Phone: \_\_\_\_\_  
(Towing company name or other authorized person)

I certify that the items above were released to my custody by: Cpl Jim Browner  
(Officer's Name)

X [Signature] There are no "HOLDS" on this vehicle.  
(Signature of towing company employee or other authorized person receiving vehicle and contents)

Items retained by Officer? ☐ None ☐ Yes, describe ALL: \_\_\_\_\_

COMPLETE NOTICE BELOW FOR ABANDONED VEHICLES ONLY

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Vehicle released to \_\_\_\_\_ Date \_\_\_\_\_

Contents released to \_\_\_\_\_ Date \_\_\_\_\_



IDAHO STATE POLICE  
TOWED VEHICLE INVENTORY/N .CE  
Date 1-7-2007 Time 1400

Location: US 95 Milepost 257 Case No. 207000031  
Reason for Towing: Driver Arrest ☐ Abandoned ☐ Traffic Hazard ☐ Accident ☒ Private Property ☐  
Extraordinary Circumstances ☐ (Specify): \_\_\_\_\_

Registered Owner: Peter Molton Address: 227 Lakeview Dr. Burbank WA  
Driver: Peter Molton Address: \_\_\_\_\_  
Lien Holder: City Auto Financial Address: \_\_\_\_\_

Vehicle: Color White Year 2005 Make Honda S2000 cp Body 2dr coupe  
State & License # WA 612 TXU V.I.N. JHMAP21475S006899  
Odometer Reading: Entire Vehicle Locked? ☐ Yes ☒ No  
Body Damage: Left side caved in from sideswipe crash

Contents: Empty

	Yes	No
Radio	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Tape Deck/CD	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Spare Tire	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Glove Box Locked	<input type="checkbox"/>	<input type="checkbox"/>
Other (See attached)	<input type="checkbox"/>	<input type="checkbox"/>

Vehicle/contents taken to: Grangerille 1100 North B Street  
(Physical location)  
by: C&B Towing Phone: (208) 983-2385  
(Towing company name or other authorized person)

I certify that the items above were released to my custody by: Col Jim Browner  
(Officer's Name)

X [Signature]  
(Signature of towing company employee or other authorized person receiving vehicle and contents)

There are no "HOLDS" on this vehicle.

Items retained by Officer? ☒ None ☐ Yes, describe ALL: Air bags deployed

COMPLETE NOTICE BELOW FOR ABANDONED VEHICLES ONLY

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- [ ] The value of this vehicle has been appraised at MORE than \$200. Storage may be charged for a maximum number of sixty (60) days. If your vehicle is not claimed prior to \_\_\_\_\_ (60 days from date above), it will be sold.

Vehicle released to \_\_\_\_\_ Date \_\_\_\_\_

Contents released to \_\_\_\_\_ Date \_\_\_\_\_

LICENSE NO.	LICENSE EXPIRES	YEAR	MAKE	MODEL	COLOR
I39868	10/31/200	1997	BUIC	SKY	6 1
VEHICLE IDENTIFICATION NO.		TITLE NO.	BODY TYPE		
		B98671255	SEDAN, 4 DOOR		



Idaho Transportation Dep  
Division of Motor Vehicles  
PO Box 7129  
Boise, ID 83707-1129

**THIS IS  
NOT A BILL**

**I  
D  
A  
H  
O**

STICKER: 0710 030795  
DESCRIP:

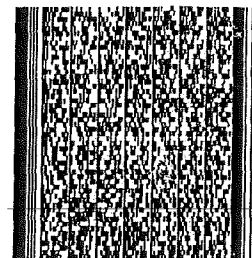
RC: 25020061018102358

REG TYPE PC CAR

ISSUED:

10/18/06

10:23:58



BYRD, JOE

416 ELK STREET  
GRANGEVILLE

ID 83530

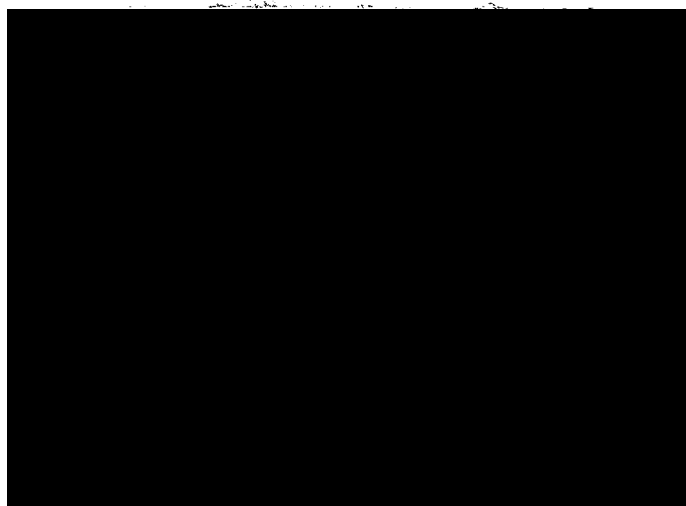
**TOTAL FEES PAID 28.25**

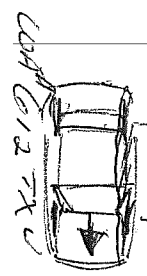
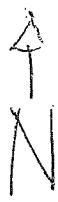
TRAN: RN  
BU 25/0

I/We certify under penalty of law that this vehicle  
is and will be continuously insured as prescribed  
by law (see reverse side).

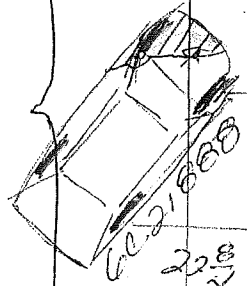
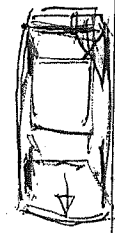
IDAHO GRANGEVILLE HIGHWAY DISTRICT  
THESE LICENSE PLATES BELONG TO YOU - REMOVE THEM WHEN YOU SELL THE VEHICLE

APPLICANT MUST SIGN TO BE VALID





GUESS  
DEBRIS  
359' 11" N 14' 1" W



- Gauges
- A) 18" x 2" x 1/2"
  - B) 1' x 1" x 1/2"
  - C) 17' x 1/2" x 1/4"
  - D) 2 x 3" x 3/4"

- Gauges
- A) 8' 5" N 13' E
  - B) 9' 9" N 17' 10" E
  - C) 14' 5" N 17' 5" E
  - D) 10' 0" N 17' 9" E

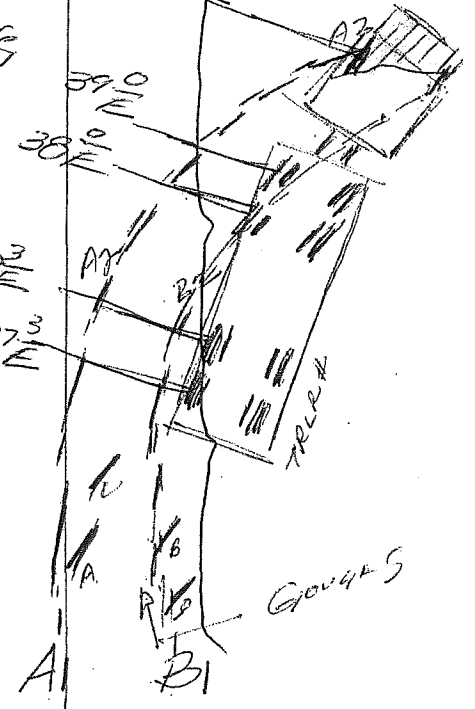
- A1) 0' 0" N 12' 0" E
- A2) 56' 0" N 10' 0" E
- A3) 103' 10" N 44' 10" E
- B1) 0' 0" N 17' 9" E
- B2) 56' 0" N 17' 8" E
- B3) 103' 10" N 50' 0" E

CRASH LOCATION: US 95 @ 257.7		
SCALE: N/A	CASE # 60700031	DRAWN BY: GSK
DATE: 01/07/07		
WTR CLOUDY/SLEET		
ROADS: WET		PAGES: 184 OF 1

RP APPROX  
7 MILES  
N OF MP 257

103' 10" N  
44' 10" E  
90' 5" N  
87' 6" N  
59' 0" E  
38' 0" E

51' 6" N 30' 3" E  
49' 8" N 27' 3" E



<b>ACORD<sup>TM</sup> CERTIFICATE OF LIABILITY INSURANCE</b>		DATE (MM/DD/YYYY) 12/15/06
PRODUCER AON Truck Group PO Box 3870 Little Rock, AR 72203	THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.	
INSURED Swift Transportation Co., Inc. and Its Subsidiaries P.O. Box 29243 Phoenix, AZ 85038-9243	INSURERS AFFORDING COVERAGE INSURER A: Self Insured INSURER B: INSURER C: INSURER D: INSURER E:	NAIC #

**COVERAGES**

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

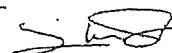
INSR	ADD'L	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS
		<b>GENERAL LIABILITY</b> <input type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS MADE <input type="checkbox"/> OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input type="checkbox"/> PROJECT <input type="checkbox"/> LOC				EACH OCCURRENCE \$ DAMAGE TO RENTED PREMISES (Ea occurrence) \$ MED EXP (Any one person) \$ PERSONAL & ADV INJURY \$ GENERAL AGGREGATE \$ PRODUCTS - COMP/OP AGG \$
A		<b>AUTOMOBILE LIABILITY</b> <input checked="" type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> HIRED AUTOS <input type="checkbox"/> NON-OWNED AUTOS	Swift is a Qualified Self-Insured by the Federal Motor Carrier Safety Administration	12/26/90	01/01/08	COMBINED SINGLE LIMIT (Ea accident) \$1,000,000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$
		<b>GARAGE LIABILITY</b> <input type="checkbox"/> ANY AUTO				AUTO ONLY - EA ACCIDENT \$ OTHER THAN AUTO ONLY: EA ACC \$ AGG \$
		<b>EXCESS/UMBRELLA LIABILITY</b> <input type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE DEDUCTIBLE RETENTION \$				EACH OCCURRENCE \$ AGGREGATE \$ \$ \$ \$
		<b>WORKERS COMPENSATION AND EMPLOYERS' LIABILITY</b> ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? INCL EXCL If yes, describe under SPECIAL PROVISIONS below				WC STATUTORY LIMITS E.L. EACH ACCIDENT \$ E.L. DISEASE - EA EMPLOYEE \$ E.L. DISEASE - POLICY LIMIT \$
		OTHER				

**DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES / EXCLUSIONS ADDED BY ENDORSEMENT / SPECIAL PROVISIONS**

Swift Transportation - MC#136818/DOT #54283  
 Excess Auto Coverage - Policy #N07QA00120- \$1,000,000 Limit of Liability -  
 Insurance Carrier - Lloyds of London

In the event of a claim, please contact the Swift Transportation Claim Dept at (800) 467-2793.

**CERTIFICATE HOLDER**

Evidence of Coverage  2200 S. 75th Ave Phoenix, AZ 85043 USA	<b>CANCELLATION</b> SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL <u>30</u> DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES. AUTHORIZED REPRESENTATIVE 
--	--

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Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

FILED  
2009 OCT 8 AM 11 53  
PATTY O. WEEKS  
CLERK OF THE DISTRICT COURT  
*Patty O. Weeks*  
DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

WILLIAM P. TEURLINGS,	)	Case No: CV09-0025
	)	
	)	AFFIDAVIT OF
Plaintiff,	)	MALLORY E. LARSON
	)	
vs.	)	
	)	
MALLORY E. LARSON,	)	
	)	
	)	
Defendant.	)	
_____	)	

AFFIDAVIT OF  
MALLORY E. LARSON

STATE OF IDAHO )  
 ) ss.  
County of Clearwater )

MALLORY E. LARSON, being first duly sworn on oath, deposes and says:

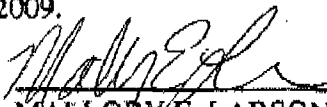
1. I am an adult citizen of the United States of America, over the age of twenty-one (21), competent to testify as a witness, and make this affidavit on personal knowledge.

2. I currently live at 12878 Vista Avenue, Orofino, Idaho. I have lived in Orofino, Idaho and have been a resident of Clearwater County since November of 2007.

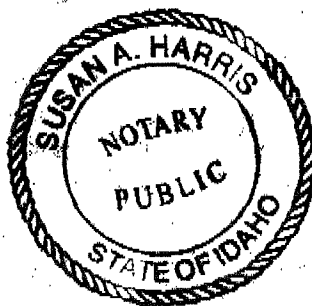
3. The Summons and Complaint in this case were served by a process server at my residence at 12878 Vista Avenue, Orofino, Idaho.

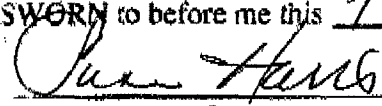
I swear under the penalties of perjury that the above statements are true to the best of my knowledge.

DATED: October 7, 2009.

  
MALLORY E. LARSON

SUBSCRIBED AND SWORN to before me this 7 day of October, 2009.



  
Notary Public in and for the State of Idaho,  
residing at Peck, ID therein.  
My Commission Expires: 11/18/2010

AFFIDAVIT OF  
MALLORY E. LARSON

-2-



CERTIFICATE OF SERVICE

I hereby certify that on the 8<sup>th</sup> of October 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith, Cannon & Bond PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501

X U.S. MAIL  
— HAND DELIVERED  
— OVERNIGHT MAIL  
X TELECOPY (FAX)

  
Sonyalee R. Nutsch

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

FILED  
2009 OCT 8 AM 11 53  
PATTY O. WEEKS  
CLERK OF THE DIST. COURT  
*[Signature]*  
DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

WILLIAM P. TEURLINGS,	)	Case No: CV09-0025
	)	
	)	DEFENDANT'S REPLY TO PLAINTIFF'S
Plaintiff,	)	PARTIAL OBJECTION TO
	)	DEFENDANT'S MOTION FOR CHANGE
vs.	)	OF VENUE TO CLEARWATER COUNTY
	)	
MALLORY E. LARSON,	)	
	)	
	)	
Defendant.	)	
	)	

---

I.

INTRODUCTION

On January 6, 2009, plaintiff filed his Complaint in this case in Nez Perce County. On July 24, 2009, defendant filed a Motion for Change of Venue to Clearwater County, the county where defendant Mallory Larson currently resides and where she resided at the time the Complaint in this case was filed. On October 6, 2009, plaintiff filed a Partial

DEFENDANT'S REPLY TO PLAINTIFF'S  
PARTIAL OBJECTION TO DEFENDANT'S  
MOTION FOR CHANGE OF VENUE TO  
CLEARWATER COUNTY

Objection to Defendant's Motion for Change of Venue to Clearwater County. Plaintiff stated that his objection was partial "in that Defendant's Motion is correct that the venue of this Action should be located in Idaho County, Idaho, or Clearwater County, Idaho." (Plaintiff's Partial Objection, 10/6/09, p. 2.) This Reply is submitted in response to plaintiff's Partial Objection.

## **II.**

### **ARGUMENT**

The relevant portion of Idaho Code § 5-404 states that:

In all other cases the action must be tried in the county in which the defendants, or some of them, reside, at the commencement of the action; or if none of the defendants reside in the state, or if residing in this state, the county in which they reside is unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint. . . .

*Id.*

In his Complaint, plaintiff alleged that "Defendant Mallory E. Larson was [sic] the time of collision a resident of Clearwater County, Idaho." (Complaint, 1/6/2009, ¶ II). Ms. Larson admitted in her Answer to the Complaint that she is a resident of Clearwater County, Idaho. (*See* Answer to Complaint and Demand for Jury Trial, 7/24/2009). In her affidavit filed in this matter, Ms. Larson affirmed that she has been a resident of Clearwater County since November of 2007. It is therefore undisputed that Ms. Larson is currently and was at the time plaintiff filed his Complaint, a resident of Clearwater County, Idaho. Under I.C. § 5-404, this case must be tried in Clearwater County, absent plaintiff proving that an

alternative provision of the statute should apply.

In his Partial Objection, plaintiff does not assert that he was unaware of Ms. Larson's county of residence when he filed the lawsuit.<sup>1</sup> On the contrary, Ms. Larson was properly served by plaintiff's process server at her residence in Clearwater County as shown in the Affidavit of Service filed by plaintiff on July 30, 2009. Instead, plaintiff first argues that venue should be located in Idaho County for the convenience of the witnesses. (*See* Plaintiff's Partial Objection, p. 2). However, plaintiff acknowledges that one witness resides in Boise, Idaho, another in Burbank, Washington, and plaintiff lives in Fresno, California. Only one witness lived in Grangeville, Idaho at the time of the accident. Pursuant to I.R.C.P. 40(e)(1)(C), one potential witness possibly still living in Idaho County does not equal "satisfactory proof...[t]hat the convenience of witnesses and the ends of justice would be promoted by the change" of venue to Idaho County. *See id.*

Plaintiff also cites *Hayes v. Kingston*, 140 Idaho 551, 96 P.3d 652 (2004), for the proposition that venue is "proper in the County 'the cause of action arose in.'" (Plaintiff's Partial Objection, p. 2.) However, *Hayes* involved claims by shareholders of securities fraud

---

<sup>1</sup> Although Idaho does not have any case law discussing the burden of proof required to establish one of the alternatives of I.C. § 5-404, Texas courts have dealt with this issue under a similar statute. In *Pan American Sign Company v. J.B. Hotel Company et. al.*, 403 S.W.2d 548 (1966), **the court held that the burden of proof was on the plaintiff to show by preponderance of evidence that defendant's residence was unknown to plaintiff at the time suit was filed.** *See id.* The court stated that "[i]t is a well established rule that a person's right to be sued in the county of his residence is a valuable right, of which he should not be deprived unless it is shown by a preponderance of the evidence that the case comes under some 'exception' to the rule." *Id.* at 551. Although plaintiff stated in his Complaint that he was unaware of plaintiff's county of residence, the fact that he also alleged that defendant resided in Clearwater County at the time of the accident and had plaintiff served in Clearwater County is contrary to the bare allegation contained in his Complaint. Plaintiff would have to show by a preponderance of the evidence that defendant's residence was unknown to him at the time suit was filed. Plaintiff has failed to produce any evidence on this issue and as such has failed to meet his burden.

against a corporation and its officers. *See id.* The last provision of I.C. §5-404 states that "...in all actions against any corporation organized under the laws of the state of Idaho, suit or action shall be commenced and tried in the county of this state where the defendant has its principal place of business or in the county in which the cause of action arose." *Id.* In *Hayes*, the Supreme Court of Idaho held that, based on the plain language of I.C. §5-404, the cause of action against the corporation should be tried in the county where the cause of action arose. *See Hayes*, 140 Idaho at 554, 96 P.3d at 655.

The defendant in this case is not a corporation. It is not disputed that defendant's place of residence at the time the action was filed was Clearwater County. There has been no evidence presented to establish that an alternate provision of I.C. § 5-404 applies. Therefore, pursuant to the plain language of the statute, this case should be tried in Clearwater County.


### III.

### CONCLUSION

Based on the foregoing, defendant respectfully requests that her Motion for Change of Venue to Clearwater County be granted.

DATED this 8<sup>th</sup> day of October 2009.

CLEMENTS, BROWN & McNICHOLS, P.A.

By:   
SONYALEE R. NUTSCH  
Attorneys for Defendant

DEFENDANT'S REPLY TO PLAINTIFF'S  
PARTIAL OBJECTION TO DEFENDANT'S  
MOTION FOR CHANGE OF VENUE TO  
CLEARWATER COUNTY

CERTIFICATE OF SERVICE

I hereby certify that on the 8<sup>th</sup> of October 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith & Cannon PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501

X U.S. MAIL  
— HAND DELIVERED  
— OVERNIGHT MAIL  
X TELECOPY (FAX)

  
\_\_\_\_\_  
Sonyalee R. Nutsch



COURT MINUTES

CV-2009-0000025

William P Teurlings vs. Mallory E Larson

Hearing type: Change of Venue

Hearing date: 10/13/2009

Time: 8:58 am

Judge: Carl B. Kerrick

Courtroom:

Court reporter: Nancy Towler

Minutes Clerk: TERESA

Tape Number: CRTRM 1

Ned Cannon

Sonyalee Nutsch

85843 Mr. Cannon and Ms. Nutsch present.  
85902 Court addresses Counsel.  
85914 Ms. Nutsch presents argument on Defendant's Motion to Change Venue.  
85955 Mr. Cannon addresses the Court on Defendant's Motion to Change Venue.  
90131 Ms. Nutsch presents rebuttal argument.  
90215 Court takes matter under advisement and will issue written order.  
90238 Court recess.

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

FILED  
2009 NOV 4 PM 12 51

PATTY O. WEEKS  
CLERK OF THE DISTRICT COURT  
*Patty O. Weeks*  
DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

WILLIAM P. TEURLINGS,

Plaintiff,

vs.

MALLORY E. LARSON,

Defendants

Case No: CV09-00025

NOTICE OF SERVICE

I, Sonyalee R. Nutsch, attorney for defendant, pursuant to I.R.C.P. 33(a)(5), and 34(d) certify that on the 4th day of November, 2009, DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION were served on counsel for plaintiff, Ned A. Cannon.

DATED this 4th day of November 2009.

CLEMENTS, BROWN & McNICHOLS, P.A.

By *Sonyalee R. Nutsch*  
SONYALEE R. NUTSCH  
Attorneys for Defendant



CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of November 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith, Cannon & Bond, PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501

☐ U.S. MAIL  
☒ HAND DELIVERED (via Valley Messenger)  
☐ OVERNIGHT MAIL  
☐ TELECOPY (FAX)

  
Sonyalee R. Nutsch

Case No. CV 09-420  
 Filed NOV 10 2009  
 at 3:10 o'clock PM  
**FILED** Carrie Bird  
 2009 NOV 4 PM 4:44 By 1 Clerk  
 Deputy  
 PATTY O. WEEKS  
 CLERK OF THE DIST. COURT  
*[Signature]*  
 DEPUTY

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE**

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendant.

CASE NO. CV 2009-0025

**ORDER GRANTING  
 DEFENDANT'S MOTION  
 FOR CHANGE OF VENUE**

This matter came before the Court on the Defendant's Motion for Change of Venue to Clearwater County. The Court heard oral argument on October 13, 2009. The Plaintiff, William P. Teurlings, was represented by Ned Cannon, Attorney at Law. The Defendant, Mallory Larsen, was represented by Sonyalee Nutsch, of the firm Clements, Brown & McNichols. The Court, having heard argument and being fully advised in the matter, hereby renders its decision.

**BACKGROUND**

William Teurlings filed this lawsuit after he was involved in a motor vehicle collision which occurred in Idaho County on January 7, 2007. The Complaint was filed in Nez Perce

County on January 6, 2009. On July 24, 2009, the Defendant filed a motion for change of venue, seeking to move the case to Clearwater County, the county where the Defendant resides. On October 6, 2009, the Plaintiff filed a partial objection to the Defendant's motion for change of venue, arguing that venue should be moved to Idaho County, the county where the collision occurred.

### STANDARD OF REVIEW

Determination of venue is within the discretion of the court only in cases where conflicting issues of fact must be resolved, such as the actual residence of a defendant, convenience of witnesses, or impartial trial. *Hayes v. Kingston*, 140 Idaho 551, 554, 96 P.3d 652, 655 (2004). Otherwise, where there are no conflicting issues of fact,<sup>1</sup> a trial court lacks discretion and must grant or deny a motion to change venue in accordance with relevant statutes. *See Id.*

### ANALYSIS

I.R.C.P. 40(e) sets forth the requirements for change of venue. The rule states in pertinent part:

[T]he judge or magistrate ***must***, on motion pursuant to Rule 12(b), change the venue of a trial when it appears by affidavit or other satisfactory proof:

(A) that the county designated in the complaint is not the proper county, which motion must be made no later than fourteen (14) days after the party files a responsive pleading, or

(B) That there is reason to believe that an impartial trial cannot be had therein, or

(C) That the convenience of witnesses and the ends of justice would be promoted by the change.

---

<sup>1</sup> If it can be ascertained where the Defendants reside, and the Court finds that the action was filed in a county where no Defendants reside then it must, upon the timely filing of the Defendants' motion, remove the case to where at least one of the Defendants reside. *See Pintlar Corp. v. Bunker Ltd. Partnerships*, 117 Idaho 152, 156, 786 P.2d 543, 547 (1990)

I.R.C.P. 40(e)(1) (emphasis added). This rule is couched in mandatory language requiring a trial court to grant a change of venue motion for any of the three reasons stated above. *Corder v. Idaho Farmway, Inc.*, 133 Idaho 353, 358, 986 P.2d 1019, 1024 (Ct. App. 1999).

In accordance with I.C. § 5-404, the Defendant asserts that venue is proper only in Clearwater County, Idaho, where the named Defendant resides. I.C. § 5-404 provides in part:

In all other cases<sup>2</sup> the action must be tried in the county in which the defendants, or some of them, reside, at the commencement of the action . . . and provided, further, that in all actions against any corporation organized under the laws of the state of Idaho, suit or action shall be commenced and tried in any county of this state where the defendant has its principal place of business or in the county in which the cause of action arose.

The requirements of the venue statute are also mandatory, and the statute recognizes the general principal that the Defendant has a right to a trial in her county of residence. *Hayes v. Kingston*, 140 Idaho 551, 554, 96 P.3d 652, 655 (2004). It follows that if a complaint is filed in a county where no Defendant resides then venue is improper in that county in accordance with I.C. § 5-404. *See Id.*

In the case at hand, the Defendant is currently a resident of Clearwater County. Further, the Defendant was a resident of Clearwater County at the time of the collision. *Affidavit of Mallory E. Larson*, filed October 8, 2009. Thus, in accordance to I.R.C.P. 40(e)(1)(A) and I.C. § 5-404, the Court must remove the case to Clearwater County, Idaho, where venue is proper according to relevant statutes.

The Plaintiff filed a partial objection to the Defendant's motion for change of venue,

---

<sup>2</sup> I.C. § 5-404 is titled Other actions – Venue determined by residence – Exceptions. I.C. § 5-404 is used when determining venue for cases which do not fall within the confines of the other venue statutes which include: I.C. § 5-401 (“Actions relating to real property”), I.C. § 5-402 (“Actions for penalties and against officers”), and I.C. § 5-403 (“Actions against Counties”). The case at bar is not an action related to real property, for penalties, against officers or against counties. Thus, venue in this case is appropriately determined by I.C. § 5-404.

arguing that for the convenience of the witnesses, venue is proper in Idaho County, the situs of the collision. The Plaintiff relies on *Hayes v. Kingston*, 140 Idaho 551, 96 P.3d 652 (2004) in support of his argument that venue should be moved to Idaho County. *Hayes* is distinguishable from the case at hand, however, because the defendant in *Hayes* was a corporation, thus, pursuant to I.C. § 5-404, the cause of action should be tried in the county where the cause of action arose. *Id.* at 554, 96 P.3d at 655. The Defendant in the case at hand is an individual, not a corporation, therefore I.C. § 5-404 requires the case be transferred to the county of the Defendant's residence, Clearwater County.

Further, should the Plaintiff pursue the argument that venue is proper in Idaho County due to the convenience of the witnesses, such a determination is best left to the court presiding over the case in the proper county, Clearwater County. *See Spaulding v. Hoops*, 49 Idaho 289, 287 P.2d 947 (1930)( where a case is originally filed in the improper county, it must first be removed to the county where venue is proper before the Court can consider changing venue for the convenience of the witnesses). When a case is originally filed in an improper county it must be moved to where venue is proper before the convenience of the witnesses may be considered. Although it may later be found that Idaho County is the best venue due to the convenience of the witnesses, it must first be removed to where venue is proper. This ruling is in keeping with the general principal that the Defendant has a right to have the case be heard in her county of residence. Thus it is appropriate to allow the court where venue is proper to make the determination to remove it to another venue for the convenience of witnesses. In accordance with I.R.C.P 40(e)(1) and I.C. § 5-404, this case must be moved to Clearwater County, Idaho, where the named Defendant resides.

## CONCLUSION

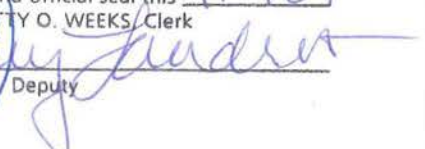
For the reasons stated above, the Defendant's Motion for Change of Venue to Clearwater County is granted pursuant to I.R.C.P. 12(b)(3), 40(e) and I.C. § 5-404.


## ORDER

The Defendant's Motion for Change of Venue to Clearwater County is hereby GRANTED. This case is hereby REMOVED to Clearwater County. IT IS SO ORDERED.

Dated this 4<sup>th</sup> day of November 2009.

  
CARL B. KERRICK – District Judge

I, Patty O. Weeks Clerk of the above entitled Court do hereby certify the foregoing to be a full, true and correct copy of the original in the above entitled cause as the same now appears on file and of record in my office.  
WITNESS my hand and official seal this 11-9-09  
PATTY O. WEEKS, Clerk  
By   
Deputy



CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing ORDER GRANTING DEFENDANT'S MOTION FOR CHANGE OF VENUE was:

\_\_\_\_\_ faxed this \_\_\_\_\_ day of November, 2009, or

1 hand delivered via court basket this 5<sup>th</sup> day of November, 2009, or

1 mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 5<sup>th</sup> day of November, 2009, to:

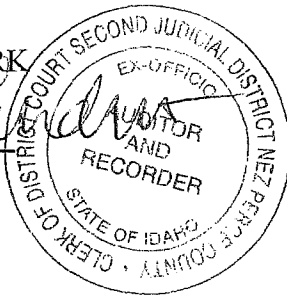
Ned A. Cannon  
Smith & Cannon PLLC  
508 Eighth Street  
Lewiston, ID 83501

*-mailed-*

Sonyalee R. Nutsch  
Clements, Brown & McNichols  
P.O. Box 1510  
Lewiston, ID 83501

PATTY O. WEEKS, CLERK

By: *[Signature]*  
Deputy



ORDER GRANTING DEFENDANT'S  
MOTION FOR CHANGE OF VENUE

Case No. WM-420  
Filed Nov 10 2009  
at 3:10 o'clock P.M.  
Carrie Ward  
Clerk  
By 1 Deputy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,  
Plaintiff,

vs.

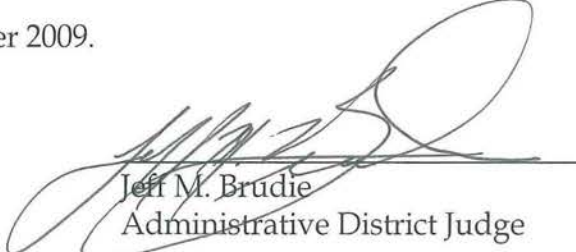
MALLORY E. LARSON,  
Defendant.

Case No. CV 04-420

ORDER ASSIGNING JUDGE

It is **ORDERED** that Judge Bradbury, whose chambers are located in Grangeville, Idaho, is assigned to preside over all further proceedings in the above-entitled matter.

DATED this 9 day of November 2009.

  
Jeff M. Brudie  
Administrative District Judge



CERTIFICATE OF SERVICE

I do hereby certify that a full, true, complete  
and correct copy of the foregoing  
ORDER ASSIGNING JUDGE was mailed to:

Ned Cannon  
508 8<sup>th</sup> St  
Lewiston, ID 83501

Sonyalee Nutsch  
PO Box 1510  
Lewiston, ID 83501

The Hon John Bradbury  
Grangeville, ID 83530

on this 16<sup>th</sup> day of November 2009.

  
\_\_\_\_\_  
Deputy Clerk



2009 NOV 16 A 9:11

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

William P Teulings

Plaintiff,

vs.

Mallory E Larson

Defendant.

CASE NO. WD9-420

ORDER OF DISQUALIFICATION

The undersigned presiding Judge having good cause to disqualify himself from this case, does hereby deem himself disqualified from further proceedings herein, under rule 40(d)(4), I.R.C.P., and requests the Administrative Judge to appoint another Judge to hear this case.

Dated this 16 day of November, 2009.

John H Bradbury  
JOHN H BRADBURY, District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order of Disqualification was hand-delivered, faxed or mailed on the 16th day of November 2009 to:

Jeff M Brudie  
Administrative District Judge  
Faxed: 208-799-3058

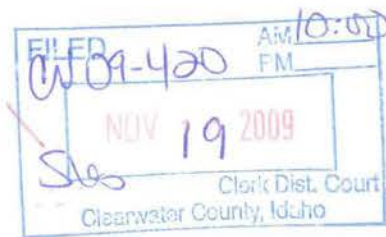
Sonja Lee Nutsch  
P.O. Box 1510  
Lewisston, ID 83501

Ned Cannon  
908 Elm St  
Lewisston, ID 83501



CARRIE BIRD  
Clerk of the District Court

By: [Signature]  
Deputy Clerk



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TERULINGS,

Plaintiff,

vs.

MALLORY E. LARSEN,

Defendant.

Case No. CV 09-420

ORDER ASSIGNING JUDGE

It is **ORDERED** that Judge Stegner, whose chambers are located in Moscow, Idaho,  
is assigned to preside over all further proceedings in the above-entitled matter.

DATED this 19 day of November 2009.

  
Jeff M. Brudie  
Administrative District Judge

## CERTIFICATE OF SERVICE

I do hereby certify that a full, true, complete  
and correct copy of the foregoing  
ORDER ASSIGNING JUDGE was mailed to:

Sonyalee Nutsch  
Lewiston, ID 83501

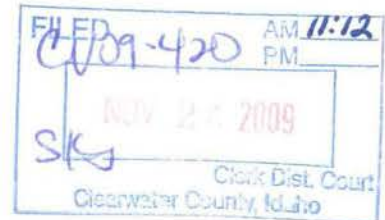
Ned Cannon  
Lewiston, ID 83501

The Hon John Stegner  
PO Box 8068  
Moscow, ID 83843

on this 19<sup>th</sup> day of November 2009.

Sue K. Summerton  
Deputy Clerk





NED A. CANNON, ISB No. 2331  
SMITH & CANNON PLLC  
Attorney for Plaintiff  
508 Eighth Street  
Lewiston, ID 83501  
Telephone: (208) 743-9428  
Fax: (208) 746-8421

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendant.

Case No.: CV 09-420

PLAINTIFF'S I.R.C.P. RULE 40(d)(1)  
DISQUALIFICATION WITHOUT CAUSE

Comes now the Plaintiff, by and through his attorney of record, Ned A. Cannon, of the law firm Smith & Cannon PLLC, and, under and pursuant to Idaho Rules of Civil Procedure, Rule 40(d)(1), hereby moves for the Disqualification of Judge John Stegner from presiding over this action.

DATED this 23<sup>rd</sup> day of November, 2009.

SMITH & CANNON PLLC

  
Ned A. Cannon, attorney for Plaintiff



**CERTIFICATE OF SERVICE**

I, Ned A. Cannon, declare that, on the date indicated below, I served a true and correct copy of *Plaintiff's I.R.C.P. Rule 40(d)(1) Disqualification Without Cause* on the following parties via the method(s) indicated below:

The Honorable John Stegner  
Latah County District Court  
P.O. Box 8068  
Moscow, ID 83843

**Via:**

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
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Sonyalee R. Nutsch  
Clements, Brown & McNichols, P.A.  
321 13<sup>th</sup> Street  
P.O. Box 1510  
Lewiston, ID 83501

**Via:**

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
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- ☐ Facsimile

Signed this 23<sup>rd</sup> day of November, 2009, at Lewiston, Idaho.

  
Ned A. Cannon



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,  
Plaintiff,

vs.

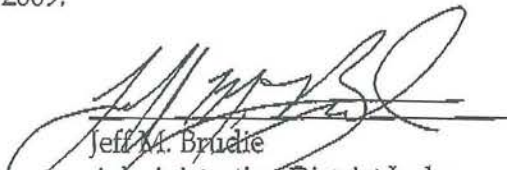
MALLORY E. LARSON,  
Defendant.

Case No. CV09-00420

ORDER ASSIGNING JUDGE

It is **ORDERED** that Judge Kerrick, whose chambers are located in Lewiston, Idaho,  
is assigned to preside over all further proceedings in the above-entitled matter.

DATED this 25 day of November 2009.

  
Jeff M. Brudie  
Administrative District Judge



## CERTIFICATE OF SERVICE

I do hereby certify that a full, true, complete  
and correct copy of the foregoing  
ORDER ASSIGNING JUDGE was mailed to:

Ned Cannon  
508 8<sup>th</sup> St  
Lewiston, ID 83501

Sonyalee Nutsch  
PO Box 1510  
Lewiston, ID 83501

The Hon Carl Kerrick  
Lewiston, ID 83501

on this 1<sup>st</sup> December  
day of November 2009.

Sue K. Summerton

Deputy Clerk



Case No. CV-09-420  
Filed 12/1/09  
at 10:10 o'clock a M  
Charlie Bird Clerk  
By SLs Deputy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MALLORY E. LARSON, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Case No. CV-09-00420

ORDER GRANTING MOTION  
FOR DISQUALIFICATION

Plaintiff having filed a Motion for Disqualification of the undersigned District Judge pursuant to Rule 40(d)(1), I.R.C.P.,

IT IS ORDERED that plaintiff's Motion for Disqualification is granted..

The undersigned requests that the Administrative Judge of the Second Judicial District appoint another district judge to preside in this matter.

DATED this 24<sup>th</sup> day of November, 2009.

John R. Stegner  
John R. Stegner  
District Judge

CERTIFICATE OF SERVICE

I do hereby certify that a full, true and correct copy of the foregoing ORDER GRANTING MOTION FOR DISQUALIFICATION was transmitted by facsimile to:

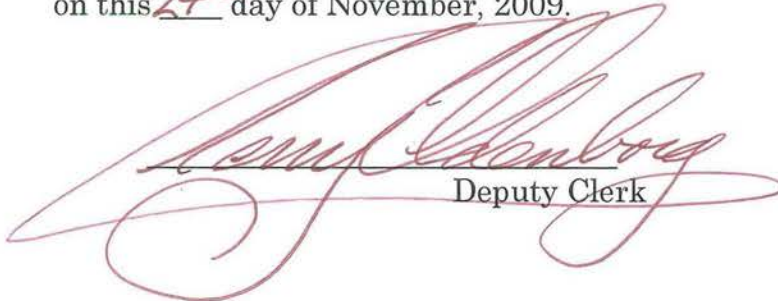
THE HONORABLE JEFF BRUDIE  
ADMINISTRATIVE JUDGE  
PO BOX 896  
LEWISTON, ID 83501  
799-3058

NED CANNON  
ATTORNEY FOR PLAINTIFF  
746-8421

SONYALEE NUTSCH  
ATTORNEY FOR DEFENDANT  
746-0753

*No response  
for fax - mailed  
11/24/09  
JD*

on this 24<sup>th</sup> day of November, 2009.

  
Deputy Clerk

CARRIE BIRD  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2010 APR 30 PM 12 43

CASE NO. CV2009-420 ✓

BY K DEPUTY

NED A. CANNON, ISB No. 2331  
SMITH & CANNON PLLC  
Attorney for Plaintiff  
508 Eighth Street  
Lewiston, ID 83501  
Telephone: (208) 743-9428  
Fax: (208) 746-8421

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendant.

Case No.: CV 09-420

NOTICE OF SERVICE

I, Ned A. Cannon, declare that, on the date indicated below, I served true and correct copies of Plaintiff's Answers to Defendant's First Set of Interrogatories and Requests for Production of Documents to Defendant Mallory E. Larson through her counsel via the method indicated below:

Sonyalee R. Nutsch  
Clements Brown & McNichols  
P.O. Box 1510  
Lewiston, ID 83501

**Via:**

- ☐ U.S. Mail
- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Email (pdf attachment)

Signed this 29<sup>th</sup> day of April, 2010, at Lewiston, Idaho.

  
Ned A. Cannon

**CERTIFICATE OF SERVICE**

I, Ned A. Cannon, declare that, on the date indicated below, I served a true and correct copy of Notice of Service on the following parties via the method(s) indicated below:

Sonyalee R. Nutsch  
Clements Brown & McNichols  
P.O. Box 1510  
Lewiston, ID 83501

**Via:**

- ☐ U.S. Mail
- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile

Signed this 29<sup>th</sup> day of April, 2010, at Lewiston, Idaho.

  
Ned A. Cannon



Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

CARRIE BIRD  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2010 AUG 9 AM 9 05

CASE NO. CV09-420

BY CB DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	Case No: CV09-420
	)	
Plaintiff,	)	DEFENDANT'S MOTION FOR
	)	STAY UNDER THE MILITIA
vs.	)	CIVIL RELIEF ACT
	)	
MALLORY E. LARSON,	)	
	)	
Defendant.	)	
_____	)	


Defendant, by and through her attorney of record, Sonyalee R. Nutsch of Clements, Brown & McNichols, P.A., pursuant to The Militia Civil Relief Act, Idaho Code § 46-409, hereby moves that all proceedings in the above matter be stayed due to the fact that defendant is a member of the Idaho National Guard and has been called up to active duty.

DEFENDANT'S MOTION FOR  
STAY UNDER THE MILITIA  
CIVIL RELIEF ACT

This Motion is supported by the Memorandum in Support of Defendant's Motion for Stay under the Militia Civil Relief Act, the Affidavit of Mallory R. Martinez (fka Larson) and the Affidavit of Sonyalee R. Nutsch filed herewith.

DATED this 6<sup>th</sup> day of August 2010.

CLEMENTS, BROWN & McNICHOLS, P.A.

By   
SONYALEE R. NUTSCH  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 6<sup>th</sup> day of August 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith & Cannon PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501  
(208) 746-8421 – facsimile

X U.S. MAIL  
— HAND DELIVERED  
— OVERNIGHT MAIL  
— TELECOPY (FAX)

  
Sonyalee R. Nutsch

DEFENDANT'S MOTION FOR  
STAY UNDER THE MILITIA  
CIVIL RELIEF ACT

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

CARRIE BIRD  
CLERK - DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2010 AUG 9 AM 9 05

CASE NO. W09-420

BY CD DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	Case No: CV09-420
	)	
Plaintiff,	)	MEMORANDUM IN SUPPORT OF
	)	DEFENDANT'S MOTION FOR
vs.	)	STAY UNDER THE MILITIA
	)	CIVIL RELIEF ACT
MALLORY E. LARSON,	)	
	)	
Defendant.	)	
_____	)	

I.

FACTS

Defendant Mallory Martinez (fka Larson), is a member of the Idaho National Guard and has been for the last seven years. (See Affidavit of Mallory E. Martinez, 6/2/2010, ¶ 2). Ms. Martinez was recently called up to active duty. She is currently finishing up a four month training session in Portland, Oregon and will then be transferred to Iraq for one year.

MEMORANDUM IN SUPPORT OF  
DEFENDANT'S MOTION FOR STAY  
UNDER THE MILITIA CIVIL RELIEF ACT -1-



(See Martinez Aff., ¶ 6). On July 29, 2010, defense counsel was provided with a copy of Ms. Martinez's Orders directly from Ms. Martinez's Section Sergeant, SSG Tony Rice. (See Affidavit of Sonyalee R. Nutsch, 8/6/2010, ¶ 3). Although the Orders have been redacted for security reasons, the unredacted portion clearly states that Ms. Martinez has been called up for active duty for a period "[n]ot to exceed 400 days". (Nutsch Aff., Exh. A).

Due to the nature of this case, the defendant's communication with counsel and participation in her defense is critical to counsel's ability to adequately defend this matter. Defendant's attendance will be required at trial. (See Nutsch Aff., ¶4).

## II.

### ARGUMENT

Pursuant to the Militia Civil Relief Act:

Whenever any active member of the national guard in time of war, armed conflict, or emergency proclaimed by a governor or by the president of the United States, shall be called or ordered by a governor to state active duty for a period of thirty (30) consecutive days or more, or to duty other than for training pursuant to title 32 U.S.C., the provision as then in effect of the soldiers' and sailors' civil relief act, 50 App. U.S.C. section 501 et. seq. .... shall apply.

I.C. §46-409 (2). Pursuant to § 522 of the current Soldiers' and Sailors' Civil Relief Act:

(b) Stay of proceedings

(1) Authority for stay

At any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, the court may on its own motion and shall, upon

application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met.

(2) Conditions for stay

An application for a stay under paragraph (1) shall include the following:

(A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.

(B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.

50 App. U.S.C.A. § 522(b).

In her Affidavit, defendant explained that she will be leaving for Iraq in September of 2010 and has been told she will be gone for one year. (Martinez Aff., ¶ 6). The Orders received from her commanding officer confirm the information provided by defendant. (See Nutsch Aff., Exh. A). The fact that the defendant is being called up to Iraq will prevent her appearance and participation in her defense in this case.

The defendant therefore has met the conditions required to stay this case pursuant to I.C. §46-409 and 50 App. U.S.C.A. §522 and hereby requests that the Court stay all proceedings of any kind being held in this matter until further Order of the Court.


**III.**

**CONCLUSION**

Based on the foregoing, defendant respectfully requests that her Motion to Stay be granted and all proceedings in this matter be stayed until further Order of the Court.

DATED this 6<sup>th</sup> day of August 2010.

CLEMENTS, BROWN & McNICHOLS, P.A.

By   
SONYALEE R. NUTSCH  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 6<sup>th</sup> day of August 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith & Cannon PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501  
(208) 746-8421 – facsimile

X U.S. MAIL  
— HAND DELIVERED  
— OVERNIGHT MAIL  
— TELECOPY (FAX)

  
Sonyalee R. Nutsch

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

CARRIE BIRD  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OTOPINO, IDAHO

2010 AUG 9 AM 9 05

CASE NO. CV09-420

BY CD DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS, )  
)  
Plaintiff, )  
)  
vs. )  
)  
MALLORY E. LARSON, )  
)  
Defendant. )  
\_\_\_\_\_ )

Case No: CV09-420

AFFIDAVIT OF  
SONYALEE R. NUTSCH

AFFIDAVIT OF  
SONYALEE R. NUTSCH

STATE OF IDAHO            )  
                                      ) ss.  
County of Nez Perce        )

SONYALEE R. NUTSCH, being first duly sworn on oath, deposes and says:

1. I am an adult citizen of the United States of America, over the age of twenty-one (21), competent to testify as a witness, and make this affidavit on personal knowledge.

2. I am one of the attorneys representing the defendant in this matter.


3. On July 29, 2010, Mallory Martinez's (fka Larson) Section Sergeant, SSG Tony Rice, delivered to me a copy of Ms. Martinez's Orders. The Orders have been redacted for security reasons. A fair and accurate copy of the redacted Orders are attached hereto as Exhibit A.

4. Ms. Martinez was a witness to plaintiff's conduct, behavior and actions shortly after the accident at issue in this case and had conversations with him afterward. I will be unable to adequately defend this claim without her presence and participation.

  
SONYALEE R. NUTSCH

SUBSCRIBED AND SWORN to before me this 6<sup>th</sup> day of August 2010.



  
Notary Public in and for the State of \_\_\_\_\_  
residing at Winston, therein.  
My Commission Expires: 9-15-2011

CERTIFICATE OF SERVICE

I hereby certify that on the 6<sup>th</sup> of August 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith & Cannon PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501

X U.S. MAIL  
— HAND DELIVERED  
— OVERNIGHT MAIL  
— TELECOPY (FAX)

  
Sonyalee R. Nutsch

STATE OF IDAHO  
MILITARY DIVISION  
4040 WEST GUARD STREET  
BOISE, ID 83705-8048

ORDERS 166-161

15 June 2010

MARTINEZ MALLORY E  
(TQ2T0-330) 2707 16TH AVE

SPC HHC 145TH SPT BN  
LEWISTON ID

83501

You are ordered to active duty as a member of your Reserve Component Unit for the period indicated unless sooner released or unless extended. Proceed from your current location in sufficient time to report by the date specified. You enter active duty upon reporting to unit home station.

REPORT TO HOME STATION: 17 September 2010, LEWISTON G1

REPORT TO MOB STATION: 20 September 2010, CP Shelby

Period of active duty: Not to exceed 400 days

Purpose: In support of Operation

Mobilization Category Code: G

Additional instructions:

- (a) You are ordered to active duty with the consent of the Governor of Idaho. The mobilization period may be shortened or extended under the provisions of DOD directive 1235.10 or supplemental guidance. The soldier will be excluded from the active Army end-strength per Title 10 USC, section 138, and will not be placed on the active duty list (sections 641(1)(D) and ) Tj ET
- (b) You are ordered to active duty for a period of less than 30 days for mobilization processing that includes medical and dental screening and/or care. If you are not determined to be medically qualified for deployment (whether ) T released from active duty, transferred to your prior status, and returned to your home address.
- (c) You will be subject to a subsequent order to active duty upon resolution of the disqualifying medical condition. If you are found to be medically qualified for deployment, then you are further ordered to active duty for a period not to exceed the period of active duty specified, unless sooner released by proper authority. This period of active duty shall exclude the medical/dental screening period but shall be calculated to that period.
- (d) Soldier to remain under command of First United States Army until deployed. Complete DD Form 2795 (Pre-Deployment) within 30 days prior to deployment
- (e) This is not a permanent change of station (PCS). Soldiers are deployed in a TCS status. Movement of household goods and dependents is not authorized. Non-temporary storage of household goods (HHG) is authorized. Storage of one Privately Owned Vehicle (POV) is authorized. Transportation of personal weapons is not authorized.
- (f) All Government meals are provided and directed. (Soldiers will receive the ) T Government quarters are provided.
- (g) Attached to USAREUR for Courts-Martial jurisdiction and the administration of Military Justice with further attachment to local on site commanders.



Additional instructions (cont):

- (h) Early reporting is not authorized. Movement by privately owned vehicle is not authorized. Rental car is not authorized.
- (i) Unit will mobilize at home station as a unit. Unit members will travel as a group.
- (j) Bring your complete military clothing bag and appropriate personal items. Excess baggage for official equipment authorized. Excess accompanied baggage is not to exceed 120 pounds. Unaccompanied baggage shipment is not authorized.
- (k) Family members may be eligible for TRICARE (military health care) benefits. For details call 1-888-DoD-CARE (1-888-363-2273) or go to web address [www.tricare.osd.mil/reserve/](http://www.tricare.osd.mil/reserve/) or email TRICARE\_help@amedd.army.mil. Eligible for TAMP 30 on REFRAD.
- (l) Call 1-800-336-4590 (National Committee for Employer Support of the Guard ) Tj about your employment or re-employment rights.
- (m) Sure Pay is mandatory. Soldier must bring the appropriate documentation to authorize sure pay. Imminent Duty Pay authorized; BAH payable based on the soldier's Home of Residence. Family Separation Allowance II (FSA-II) authorized for all soldiers with dependents. Enlisted soldiers authorized Hardship Duty Pay. Basic Allowance for Subsistence (BAS) authorized for all enlisted soldiers.
- (n) SM will contact local unit for actual initial reporting location.
- (o) Soldiers affected by this order will be provided information on Army One Source, a free service available anytime. Consultants are available to assist Soldiers and family members by calling 1-800-464-8107 or by calling collect outside the United States 1-484-530-5889. Internet access is available to email a consultant at [www.armyonesource.com](http://www.armyonesource.com). User ID is Army. The password is Onesource.
- (p) Meals and lodging will be provided at no cost to the Soldier. Claims for reimbursement require a statement of non-availability control number.
- (q) For unresolved pay issues, contact the ARNG Pay Ombudsman at toll-free 1-877-ARNGPAY or by email at [ARNG-MILPAY@ARNG-FSC.NGB.ARMY.MIL](mailto:ARNG-MILPAY@ARNG-FSC.NGB.ARMY.MIL)

FOR ARMY USE

Auth: TITLE 10 USC, SECTION 12302/HQDA MSG 231710ZApr10/DAMO-ODM/: ORD

TYP/MOBORD/HQDA NO. 1695-10

Acct clas:

Enl pay/alw: 219/0/1 2010.0000 01-1100 P2X2A00 11\*\*/12\*\* VIRQ F9203 5570 S12120

Enl tvl/pd: 2102020.0000 B1 B1TC 135197 21T1/T2 VIRQ F4210 AZVN2E 12161

Enl pay/alw: 210/1/2 2010.0000 01-1100 P2X2A00 11\*\*/12\*\* VIRQ F9203 5570 S12120

Enl tvl/pd: 2112020.0000 B1 B1TC 135197 21T1/T2 VIRQ F4210 AZVN2E 12161

SDN: MAR5855T166161

Sex: F

MDC: PM

PMOS/AOS/ASI/LIC: 92G1, YY , YY

HOR: PO BOX 2474 , OROFINO ID83544

DOR: 28-APR-09

PEBD: 01-APR-03

Security Clearance: N

Comp: ARNGUS

Format: 165

ORDERS 166-161 HQ ID , OTAG, 15 June 2010

FOR THE ADJUTANT GENERAL

\\  
\\ HQ, IDARNG //  
\\ OFFICIAL //  
\\

DISTRIBUTION:

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"INPUT BY DCSPER"

ANTHONY A. WICKHAM

COL, GS, IDARNG

DIRECTOR JOINT STAFF J-1 PERSONNEL

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

Attorneys for Defendant

CARRIE BIRD  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2010 AUG 9 PM 3 05

CASE NO. CV09-420

BY CS DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	Case No: CV09-420
	)	
Plaintiff,	)	AFFIDAVIT OF
	)	MALLORY E. MARTINEZ
vs.	)	
	)	
MALLORY E. LARSON,	)	
	)	
Defendant.	)	
_____	)	

AFFIDAVIT OF  
MALLORY E. MARTINEZ

STATE OF OREGON       )  
   ) ss.  
 County of Multnomah   )

MALLORY E. MARTINEZ formerly known as MALLORY E. LARSON,  
 being first duly sworn on oath, deposes and says:

1. I am an adult citizen of the United States of America, over the age of twenty-one (21), competent to testify as a witness, make this affidavit on personal knowledge and am the defendant in this matter.

2. I am a member of the Idaho National Guard, 145<sup>th</sup> HHC Support Battalion, headquartered in Lewiston, Idaho. I have been a member of the Idaho National Guard for seven (7) years and have achieved the rank of E-4 - specialist.

3. As a member of the Idaho National Guard, I am required to attend monthly instruction drills unless I have been called up for active duty. Each drill generally lasts four (4) days.

4. On January 7, 2007, I was on duty with the Idaho National Guard and was attending one of our regularly scheduled instruction drills in Lewiston, Idaho. On January 7, 2007, my chain of command consisted of my Section Sergeant SSG Tony Rice, First Sergeant Frost and Captain James Deverteuil. Per my superior's verbal orders, I was to provide transportation of a fellow guardsman from the drill to Boise, Idaho.

5. At the time of the accident on January 7, 2007, I was on duty with the Idaho National Guard and was acting under my superior's orders by transporting a fellow guardsman to Boise, Idaho.

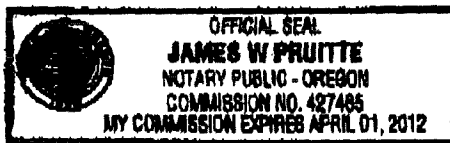
AFFIDAVIT OF  
 MALLORY E. MARTINEZ

-2-

6. I have recently been called up to active duty. I am presently in Portland, Oregon for four (4) months of training. After I complete my training in Portland, I will be transferred to Iraq for one (1) year.

Mallory E. Martinez  
MALLORY E. MARTINEZ

SUBSCRIBED AND SWORN to before me this 2 day of June 2010.



[Signature]  
Notary Public in and for the State of Oregon  
residing at Wells Fargo Bank, therein.  
My Commission Expires: 4/1/12

AFFIDAVIT OF  
MALLORY E. MARTINEZ

-3-

CERTIFICATE OF SERVICE

I hereby certify that on the 6<sup>th</sup> day of August 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith & Cannon PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501

X U.S. MAIL  
— HAND DELIVERED  
— OVERNIGHT MAIL  
— TELECOPY (FAX)

  
Sonyalee R. Nutsch

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

CARRIE BIRD  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROSINDO, IDAHO

2010 AUG 9 AM 8 05

CASE NO. CV09-420

BY CS DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	
	)	Case No: CV09-420
	)	
Plaintiff,	)	
	)	NOTICE OF HEARING
vs.	)	
	)	
MALLORY E. LARSON,	)	
	)	
Defendant.	)	
_____	)	


TO: Plaintiff, WILLIAM P. TEURLINGS, and to your attorney of record, NED A. CANNON:

PLEASE TAKE NOTICE, that the undersigned will call up for hearing, DEFENDANT'S MOTION FOR STAY UNDER THE MILITIA CIVIL RELIEF ACT before The Honorable Carl B. Kerrick at the Nez Perce County Courthouse on Tuesday, the 24<sup>th</sup> day of August, 2010, at 9:00 a.m., or as soon thereafter as counsel may be heard.



DATED this 6<sup>th</sup> day of August 2010.

CLEMENTS, BROWN & McNICHOLS, P.A.

By   
SONYALEE R. NUTSCH  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 6<sup>th</sup> day of August 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith, Cannon & Bond, PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501  
(208) 746-8421 – facsimile

X U.S. MAIL  
— HAND DELIVERED (via Valley Messenger)  
— OVERNIGHT MAIL  
— TELECOPY (FAX)

  
Sonyalee R. Nutsch

CARRIE CIDD  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
ORCINO, IDAHO

2010 AUG 18 PM 12 27

CASE NO. CV2009-420

BY Carlynn DEPUTY

NED A. CANNON, ISB No. 2331  
SMITH & CANNON PLLC  
Attorney for Plaintiff  
508 Eighth Street  
Lewiston, ID 83501  
Telephone: (208) 743-9428  
Fax: (208) 746-8421

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendant.

Case No.: CV 09-420

PLAINTIFF'S MOTION TO STRIKE  
AFFIDAVIT PROVISIONS OF  
MALLORY E. MARTINEZ AND  
SONYALEE R. NUTSCH, AND  
OBJECTION TO ABSOLUTE STAY

Under and pursuant to I.R.C.P. Rule 56(e), supporting affidavits shall be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof, referred to in an affidavit shall be attached thereto or served therewith.

It is submitted that in Mallory E. Martinez's Affidavit, Provision Number 4 is based upon hearsay regarding Ms. Martinez's "...superior's verbal orders...." In Provision Number 5, Ms. Martinez generally references her superior's orders, which are hearsay as utilized in such

PLAINTIFF'S MOTION TO STRIKE  
AFFIDAVIT PROVISIONS OF  
MALLORY E. MARTINEZ  
AND SONYALEE R. NUTSCH, AND  
OBJECTION TO ABSOLUTE STAY

provision. There is no foundation to support a statement as to how or why Ms. Martinez was acting in a certain manner and/or under certain speculative orders. Additionally, the two foregoing provisions are irrelevant to the proceeding at hand, regarding a motion for relief, under the Militia Civil Relief Act, Idaho Code §46-409.

Provision 4 of Sonyalee R. Nutsch's affidavit is conclusory and without foundation regarding Ms. Martinez purportedly being a witness to Plaintiff's "...conduct, behavior and actions shortly after the accident...." Such provisions of both affidavits should be struck.

In Sonyalee R. Nutsch's affidavit, references are made to particular orders that are attached and redacted. It is moved that such purported orders be struck in that they are neither signed nor conformed, and although references are made to certain redacted portions of Exhibit A, this reader is unable to identify where and to what degree said purported order has been redacted.

Defendant's motion seeks relief beyond that encompassed by Idaho Code §46-409 in that Defendant moves to stay "all proceedings in the above matter".

Because Plaintiff continues to seek medical care and treatment, and because certain discovery will continue to be supplemented and provided by and between the parties, it is moved that any stay that the court considers herein, be referenced such that these proceedings may continue in all manner other than as will prejudice Defendant's rights herein, as an active member of the United States military.

DATED this 17<sup>th</sup> day of August, 2010.

SMITH & CANNON PLLC

  
Ned A. Cannon, attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I, Ned A. Cannon, declare that, on the date indicated below, I served a true and correct copy of *Plaintiff's Motion to Strike Affidavit Provisions of Mallory E. Martinez and Sonyalee R. Nutsch* on the Defendant via the method(s) indicated below:

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
P.O. Box 1510  
Lewiston, ID 83501

**Via:**

- ☐ U.S. Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☒ Facsimile – (208) 746-0753
- ☐ Email (pdf attachment)

Signed this 17<sup>th</sup> day of August, 2010, at Lewiston, Idaho.

  
Ned A. Cannon



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

COURT MINUTES

	Presiding Judge	
	CARL B. KERRICK	
	Reporter	
	NANCY TOWLER	
	Date AUGUST 24, 2010	
	Time: 10:18 A.M.	
WILLIAM P. TEURLINGS,	)	
	)	
Plaintiff,	)	Docket No. CV-098-420
	)	
vs.	)	APPEARANCES:
	)	
MALLORY E. LARSON,	)	NED CANNON
	)	For, Plaintiff
Defendant.	)	
	)	SONYALEE NUTSCH
	)	For, Defendant

SUBJECT OF PROCEEDINGS: MOTION FOR STAY

BE IT KNOWN, THAT THE FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:  
COURTROOM #1

101816 Ned Cannon present. Sonyalee Nutsch present.

101836 Court questions Mr. Cannon re: no response filed with the Court.

101845 Mr. Cannon responds. He filed a Motion to Strike Affidavit Provisions of Mallory E. Martinez and Sonyalee R. Nutsch, and Objection to Absolute Stay in Clearwater County.

The Court does not have this document. Mr. Cannon has the bailiff make a copy of his for the Court.

102136 Ms. Nutsch presents argument re: motion to stay and indicates she has no objection to provision 4 of the defendant's affidavit being stricken.

102645 Mr. Cannon presents argument re: motion to stay and asks the Court to strike provisions 4 and 5 of the defendant's affidavit and provision 4 of Ms. Nutsch's affidavit.

103210 Ms. Nutsch indicates she also does not object to provision 5 of the defendant's affidavit being stricken. She does object to any part of her own affidavit being stricken. Ms. Nutsch proceeds with rebuttal argument.

103344 Court addresses counsel.

1 Page of 2 Pages

COURT MINUTES AUGUST 24, 2010

103501 Mr. Cannon addresses Court.

103536 Court requests Ms. Nutsch prepare an order.

103554 Court does not strike any portion of Ms. Nutsch's affidavit.

103622 Court grants the motion and will sign a prepared order.

103636 Recess

JENNY LANDRUS

Deputy Clerk

2 Page of 2 Pages

APPROVED:



Presiding Judge

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

FILED August 25, 2010  
11:00 AM  
CLB  
P.M. LEWISTON, IDAHO

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	Case No: CV09-420
	)	
Plaintiff,	)	ORDER
	)	
vs.	)	
	)	
MALLORY E. LARSON,	)	
	)	
Defendant.	)	
	)	

Upon filing and reading DEFENDANT'S MOTION FOR STAY UNDER THE MILITIA CIVIL RELIEF ACT and supporting Affidavits and Plaintiff's response thereto, the Court hearing oral argument and having fully considered the matter;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that DEFENDANT'S MOTION FOR STAY UNDER THE MILITIA CIVIL RELIEF ACT is GRANTED. This action is hereby STAYED until further Order of the Court.

DATED: 8-25-10

  
HONORABLE CARL B. KERRICK  
District Judge



CERTIFICATE OF SERVICE

I hereby certify that on the 25<sup>th</sup> day of August 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Sonyalee R. Nutsch  
Clements Brown & McNichols, P.A.  
P.O. Box 1510  
32113<sup>th</sup> St.  
Lewiston, Idaho 83501

Ned A. Cannon  
Smith & Cannon PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501

X U.S. MAIL  
\_\_\_ HAND DELIVERED  
\_\_\_ OVERNIGHT MAIL  
\_\_\_ TELECOPY (FAX)

Clerk

*[Handwritten Signature]*



Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

CARRIE BIRD  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2011 SEP 30 PM 4 35

CASE NO. CV09-420

BY [Signature] DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	Case No: CV09-420
	)	
Plaintiff,	)	
	)	STIPULATION TO LIFT STAY
vs.	)	
	)	
MALLORY E. LARSON,	)	
	)	
Defendant.	)	
	)	

Defendant, by and through her attorney of record, Sonyalee R. Nutsch of Clements, Brown & McNichols, P.A., and plaintiff, by and through his attorney of record, Ned Cannon of Smith & Cannon PLLC, hereby stipulate that the stay of this case previously ordered by this Court on August 25, 2010, pursuant to The Militia Civil Relief Act, Idaho Code § 46-409, be lifted.

This Stipulation is based on the fact that the defendant has returned home from active duty with the Idaho National Guard.

DATED this 28<sup>th</sup> day of September 2011.

CLEMENTS, BROWN & McNICHOLS, P.A.

By Sonyalee R. Nutsch  
SONYALEE R. NUTSCH  
Attorneys for Defendant

DATED this 27<sup>th</sup> day of Sept. 2011.

SMITH & CANNON PLLC

By: Ned A. Cannon  
NED A. CANNON  
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 28<sup>th</sup> day of September 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith & Cannon PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501  
(208) 746-8421 – facsimile

X U.S. MAIL  
— HAND DELIVERED  
— OVERNIGHT MAIL  
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Sonyalee R. Nutsch

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

October 11, 2011  
9:38  
CLB  
FBI LEWISTON, IDAHO

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	Case No: CV09-420
	)	
Plaintiff,	)	ORDER
	)	
vs.	)	
	)	
MALLORY E. LARSON,	)	
	)	
Defendant.	)	
_____	)	

Upon filing and reading the STIPULATION TO LIFT STAY of the parties and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the stay previously entered by Order of the Court on August 25, 2010, is hereby lifted and the parties may proceed in this action.

DATED: 11<sup>th</sup> day of October 2011.

CLB  
HONORABLE CARL B. KERRICK  
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 12<sup>th</sup> day of October 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Sonyalee R. Nutsch  
Clements Brown & McNichols, P.A.  
P.O. Box 1510  
32113<sup>th</sup> St.  
Lewiston, Idaho 83501

Ned A. Cannon  
Smith & Cannon PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501

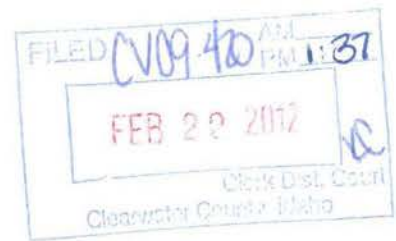
☒ U.S. MAIL  
☐ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☐ TELECOPY (FAX)

Clerk

*Jimmy Landis*







NED A. CANNON, ISB No. 2331  
SMITH & CANNON PLLC  
508 Eighth Street  
Lewiston, ID 83501  
Telephone: (208) 743-9428  
Fax: (208) 746-8421

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,  
  
Plaintiff,

v.

MALLORY E. LARSON,  
  
Defendant.

Case No.: CV 09-420

NOTICE OF SERVICE

I, Ned A. Cannon, declare that, on the date indicated below, I served an original and a true and correct copy of *Plaintiff's First Set of Supplemental Interrogatories and Requests for Production of Documents to Defendant* on Mallory Larson through her counsel via the method indicated below:

Sonyalee R. Nutsch  
Clements Brown & McNichols  
321 13th Street  
Lewiston, ID 83501

**Via:**

- ☒ U.S. Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Email (pdf attachment)



DATED this 21<sup>st</sup> day of February, 2012.

  
Ned A. Cannon

**CERTIFICATE OF SERVICE**

I, Ned A. Cannon, declare that, on the date indicated below, I served a true and correct copy of this *Notice of Service* on Mallory Larson through her counsel via the method(s) indicated below:

Sonyalee Nutsch  
Clements Brown & McNichols  
321 13th Street  
Lewiston, ID 83501

**Via:**

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile

Signed this 21<sup>st</sup> day of February 2012, at Lewiston, Idaho.

  
Ned A. Cannon



Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	Case No: CV09-420
	)	
Plaintiff,	)	NOTICE OF TAKING
	)	DEPOSITION UPON
vs.	)	ORAL EXAMINATION
	)	
MALLORY E. LARSON,	)	
	)	
Defendant.	)	
_____	)	


TO: Plaintiff, WILLIAM P. TEURLINGS, and to your attorney of record, NED CANNON:

PLEASE TAKE NOTICE that the undersigned will take the deposition, on oral examination, of **TONY A. RICE** before a notary public in and for the State of Idaho, on the 26th day of April 2012, at 9:00 a.m., at the offices of Clements, Brown & McNichols, P.A., 321 13<sup>th</sup> Street, Lewiston, Idaho 83501 (208)743-6538.

This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure.

DATED this 23rd day of March, 2012.

CLEMENTS, BROWN & McNICHOLS, P.A.

By   
SONYALEE R. NUTSCH  
Attorneys for Defendants

CERTIFICATE OF SERVICE

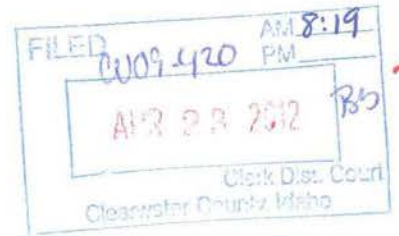
I hereby certify that on the 23rd day of March 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith, Cannon & Bond, PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501

☐ U.S. MAIL  
☒ HAND DELIVERED (via Valley Messenger)  
☐ OVERNIGHT MAIL  
☐ TELECOPY (FAX)

  
Sonyalee R. Nutsch

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189



Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	
	)	Case No: CV09-420
	)	
Plaintiff,	)	NOTICE OF SERVICE
	)	
vs.	)	
	)	
MALLORY E. LARSON,	)	
	)	
Defendants	)	
	)	

I, Sonyalee R. Nutsch, attorney for defendant, pursuant to I.R.C.P. 33(a)(5), and 34(d) certify that on the 20th day of April, 2012, DEFENDANT'S FIRST SUPPLEMENTAL ANSWERS TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION were served on counsel for plaintiff, Ned A. Cannon.

DATED this 20th day of April 2010.

CLEMENTS, BROWN & McNICHOLS, P.A.

By Sonyalee R. Nutsch  
SONYALEE R. NUTSCH  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of April 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

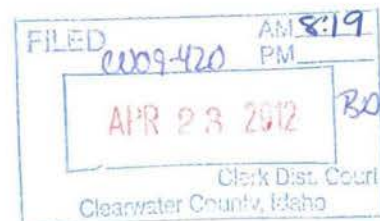
Ned A. Cannon  
Smith, Cannon & Bond, PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501

☐ U.S. MAIL  
☒ HAND DELIVERED (via Valley Messenger)  
☐ OVERNIGHT MAIL  
☐ TELECOPY (FAX)

  
Sonyalee R. Nutsch



Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189



Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	Case No: CV09-420
	)	
Plaintiff,	)	AFFIDAVIT OF SERVICE
	)	RE: TONY A. RICE
vs.	)	
	)	
MALLORY E. LARSON,	)	
	)	
Defendant.	)	
	)	

STATE OF IDAHO )  
: ss.  
County of Nez Perce )

Brad Mittendorf, being first duly sworn on oath, deposes and says:

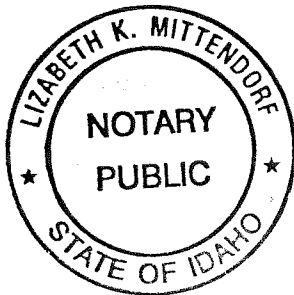
1. I am a citizen of the United States, over the age of eighteen (18) years,  
and not a party to the above-entitled action.

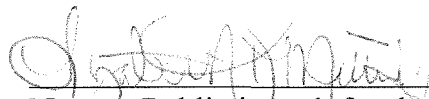
AFFIDAVIT OF SERVICE  
RE: TONY RICE

2. On the 15<sup>th</sup> day of April, 2012, I personally served a SUBPOENA and an AUTHORIZATION FOR RELEASE OF PERSONNEL RECORDS AND MEDICAL/HEALTH RELATED INFORMATION signed by Mallory E. Martinez, fka Larson upon TONY A. RICE, at approximately 5:50 a.m./p.m. at 2202 Carol Dr., City of Lewiston, County of Nez Perce, State of Idaho.

  
BRAD MITTENDORF

SWORN AND SUBSCRIBED to before me this 18<sup>th</sup> day of April 2012.



  
Notary Public in and for the State of Idaho,  
Residing at Lewiston, therein.  
My Commission Expires: 3-2017




CERTIFICATE OF SERVICE

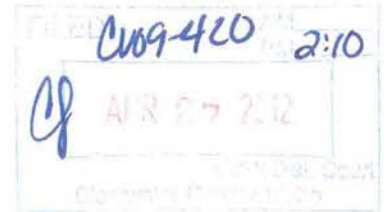
I hereby certify that on the 20<sup>th</sup> day of April 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith & Cannon PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501  
(208) 746-8421 – facsimile

  X   U.S. MAIL  
     HAND DELIVERED  
     OVERNIGHT MAIL  
     TELECOPY (FAX)

  
Sonyalee R. Nutsch

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189



Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	Case No: CV09-420
	)	
Plaintiff,	)	DEFENDANT'S MOTION FOR
	)	SUMMARY JUDGMENT
vs.	)	
	)	
MALLORY E. LARSON,	)	
	)	
Defendant.	)	
_____	)	

Defendant, by and through her attorney of record, Sonyalee R. Nutsch of Clements, Brown & McNichols, P.A., pursuant to Idaho Rule of Civil Procedure 56(b), moves for Summary Judgment as to plaintiff's claims against her.

This Motion is supported by the Memorandum in Support of Defendant's Motion for Summary Judgment, the Affidavit of SSG Tony Rice and the Affidavit of Mallory Martinez fka Larson filed herewith.

Oral argument is requested.

DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

DATED this 26<sup>th</sup> day of April 2012.

CLEMENTS, BROWN & McNICHOLS, P.A.

By Sonyalee R. Nutsch  
SONYALEE R. NUTSCH  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 26<sup>th</sup> day of April 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith & Cannon PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501  
(208) 746-8421 – facsimile

X U.S. MAIL  
— HAND DELIVERED  
— OVERNIGHT MAIL  
— TELECOPY (FAX)

Sonyalee R. Nutsch  
Sonyalee R. Nutsch

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

CV09-420 2:10  
4/8 7 2012

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	Case No: CV09-420
	)	
Plaintiff,	)	MEMORANDUM IN SUPPORT
	)	OF DEFENDANT'S MOTION
vs.	)	FOR SUMMARY JUDGMENT
	)	
MALLORY E. LARSON,	)	
	)	
Defendant.	)	
_____	)	

I.

INTRODUCTION

On January 7, 2007, Mallory Martinez fka Larson ("Ms. Martinez") was on duty with the Idaho Army National Guard when she was involved in an automobile accident with William Teurlings ("plaintiff"). On January 6, 2009, plaintiff filed his Complaint in this matter alleging one claim of negligence against Ms. Martinez. Because National Guard members are exempted from liability for state law claims arising out of their activities when

MEMORANDUM IN SUPPORT OF  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

they are in training or acting under duty, Ms. Martinez has filed a Motion for Summary Judgment asking the Court to dismiss plaintiff's Complaint against her in its entirety. This Memorandum is submitted in support of Ms. Martinez' Motion.

## II.

### FACTS

Ms. Martinez is a member of the Idaho Army National Guard, 145<sup>th</sup> HHC Support Battalion, headquartered in Lewiston, Idaho. She has been a member of the National Guard for eight (8) years and has currently achieved the rank of Sergeant – E-5. (*See* Affidavit of Mallory E. Martinez, 12/30/11, p. 2). As a member of the National Guard, unless she has been called to active duty, Ms. Martinez is required to attend monthly instruction drills. Attendance at the drills is mandated by federal law. (*See id.*; *see also* Affidavit of SSG Tony Rice, 4/26/12, ¶ 4 and 32 U.S.C.A § 502 *et. seq.*). January 7, 2007, was the final day of one of the 145<sup>th</sup>'s regularly scheduled instruction drills in Lewiston, Idaho and Ms. Martinez was in attendance. (*See* Rice Aff., ¶ 4). On January 7, 2007, Ms. Martinez' chain of command consisted of her Section Sergeant Tony Rice, First Sergeant Frost and Captain James Deverteuil. (*See* Martinez Aff., ¶4).

Each guardsman is on duty from 12:00 a.m. the first date of the drill until 11:59 p.m. the final day of the drill. (*See* Rice Aff., ¶ 5). In January of 2007, Ms. Martinez was on duty with the National Guard from 12:00 a.m. on January 6, 2007 until 11:59 p.m. on January 7, 2007. *See id.* In January of 2007, Ms. Martinez lived in Boise, Idaho. In addition, another guardsman who was also a member of the 145<sup>th</sup> lived in the Boise as well. Ms. Martinez was

instructed by her superior officer SSG Rice to provide transportation for her fellow guardsman to and from the drill in Lewiston that was completed on January 7, 2007. (*See* Rice Aff., ¶ 6; *see also* Martinez Aff., ¶ 5) At the time of the accident, Ms. Martinez was complying with that Order. (*See* Martinez Aff., ¶¶ 5-6).

After the accident, Ms. Martinez reported it to SSG Rice and a Line of Duty Investigation was completed by the Army National Guard. Ms. Martinez participated in the investigation and the determination was made that she was on duty at the time of the accident. (*See* Martinez Aff., ¶ 8, Exh A; *see also* Rice Aff., ¶ 7, Exh. A). As a result, her medical bills were paid by the Army National Guard. *See id.*

### III.

#### ARGUMENT

Pursuant to Idaho Code § 6-904:

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which: ... 4. Arises out of the activities of the Idaho national guard when engaged in training or duty under sections 316, 502, 503, 504, 505 or 709, title 32, United States Code.

Idaho Code § 6-904 was last amended in 1988 and was therefore in force, as stated above, on January 7, 2007. *See id.*

32 U.S.C.A § 502 states in pertinent part that:

(a) Under regulations to be prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, each company, battery, squadron, and detachment of the National Guard, unless excused by the Secretary concerned, shall

(1) assemble for drill and instruction, including indoor target practice, at least 48 times each year; and

(2) participate in training at encampments, maneuvers, outdoor target practice, or other exercises, at least 15 days each year.

There are no Idaho cases interpreting Idaho Code § 6-904(4) in its present form. In *Baca et. al. v. State of Idaho, The Idaho Army Reserve National Guard et. al.*, 119 Idaho 782, 810 P.2d 720 (1990), the Idaho Supreme Court analyzed the previous version of Idaho Code § 6-904(4), codified in 1987 and designated as Idaho Code § 6-904(5).

The court stated:

In 1987, Senate Bill 1161, which became Chapter 361, amended Section 6-904(5) of the Tort Claims Act, the same subsection amended in 1974 to eliminate the Guard's immunity when acting under a call of the Governor. SB 1161 closed a loophole in Section 6-904(5) by ensuring that the State of Idaho would not be liable for actions of the Guard in instances where the federal government had assumed full responsibility.

*Id.* at 793, 810 P.2d at 731. The court quoted Adjutant General Darrell V. Manning who addressed the House Transportation and Defense Committee prior to the passage of the amendments. General Manning stated, “[i]t is the primary purpose of this bill to recognize the federal government’s acceptance of responsibility for claims against the Idaho National Guard when on active duty or training under certain federal authorizations.” *Id.*

In *Baca*, two Idaho Army National Guard members were driving fire fighters back to camp when they were involved in an automotive accident most likely caused by fatigue. *Id.* at 784, 810 P.2d at 722. The court found the exemption in Idaho Code § 6-904(4)



did not apply because the Guard members were not engaged in training or duty pursuant to any of the federal regulations identified in Idaho Code § 6-904(4) but rather had been called to action by the Governor of the State of Idaho who declared a state of emergency because of the Anderson creek fire. *See id.* at 793-794, 810 P.2d at 731-732. Under those circumstances, the state of Idaho is responsible for the actions of the Guard members acting within the course and scope of their duty under state authority. *See id.*

On January 7, 2007, when the accident in this case occurred, Ms. Martinez was a member of the Army National Guard, on duty pursuant to 32 U.S.C.A. §502 and complying with a direct order from her superior officer to transport a fellow guardsman to Boise, Idaho. (*See* Martinez Aff., pp.2-3, Exh A; *see also* Rice Aff., pp. 2-3, Exh. A). The fact that Ms. Martinez was acting “in the line of duty” at the time of the accident was confirmed by the investigation completed by the National Guard Bureau. *See id.* Because Ms. Martinez was injured “in the line of duty,” her medical bills incurred as a result of the accident were paid by the Army National Guard. *See id.*

As stated previously, the rationale behind Idaho Code § 6-904(4) is to exempt Idaho National Guard members from liability when they are participating in the drills, trainings and exercises mandated by the federal government. The appropriate forum for the resolution of claims arising under those circumstances is federal court with federal claims. The only claim plaintiff alleged in his Complaint in this matter is a state law claim for negligence for which Ms. Martinez cannot be held liable for pursuant to Idaho Code § 6-

904(4). As such, plaintiff's Complaint against Ms. Martinez should be dismissed in its entirety.


IV.

CONCLUSION

Because, in accordance with Idaho Code § 6-904(4), Idaho National Guard members cannot be held liable for state law claims arising out of their activities when they are in training or acting under duty pursuant to certain federal statutes including 32 U.S.C.A. §502, plaintiff's Complaint should be dismissed.

DATED this 26<sup>th</sup> day of April 2012.

CLEMENTS, BROWN & McNICHOLS, P.A.

By   
SONYALEE R. NUTSCH  
Attorneys for Defendant

CERTIFICATE OF SERVICE

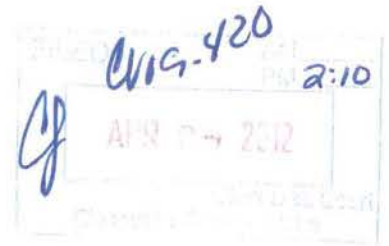
I hereby certify that on the 26<sup>th</sup> day of April 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith & Cannon PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501  
(208) 746-8421 – facsimile

X U.S. MAIL  
\_\_\_ HAND DELIVERED  
\_\_\_ OVERNIGHT MAIL  
\_\_\_ TELECOPY (FAX)

  
Sonyalee R. Nutsch

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189



Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

WILLIAM P. TEURLINGS,	)	Case No: CV09-0025
	)	
Plaintiff,	)	AFFIDAVIT OF
	)	SSG TONY RICE
vs.	)	
	)	
MALLORY E. LARSON,	)	
	)	
Defendant.	)	
_____	)	
STATE OF IDAHO	)	
	) ss.	
County of Nez Perce	)	

SSG TONY RICE, being first duly sworn on oath, deposes and says:

1. I am an adult citizen of the United States of America, over the age of twenty-one (21), competent to testify as a witness, make this affidavit on personal

knowledge.

2. I am the Section Sergeant of the Idaho National Guard, 145<sup>th</sup> HHC Support Battalion, headquartered in Lewiston, Idaho.

3. I am one of the commanding officers of Mallory Martinez, fka Mallory Larson.

4. Members of the Idaho National Guard, pursuant to 32 U.S.C.A § 502 *et. seq.*, and other implementing statutory provisions, are required to attend monthly instruction drills unless they have been called up for active duty. We assemble and drill at least 48 times per year.

5. January 7, 2007, was the final day of one of the 145<sup>th</sup>'s regularly scheduled instruction drills in Lewiston, Idaho and SPC Mallory Larson was in attendance. SPC Larson was on duty from 12:00 a.m. on January 6, 2007 to 11:59 p.m. on January 7, 2007.

6. I was aware that SPC Larson lived in Boise, Idaho and another guardsman who was also a member of the 145<sup>th</sup> lived in that area as well. I instructed SPC Larson to provide transportation for her fellow guardsman to and from the drill that was completed on January 7, 2007. I understood that she had complied with my order.


7. SPC Larson notified me of the accident after it occurred. A Line of Duty Report of Investigation was completed. The result of the investigation determined that SPC Larson was on duty at the time of the accident and her medical bills were paid as a result of that determination. A fair and accurate copy of the Report of Investigation which is

maintained as regular course in the personnel file of SPC Larson of which I am personally familiar, is attached as Exhibit A. To protect the privacy of all those involved in the investigation, their social security numbers have been redacted.

  
SSG TONY RICE

April SUBSCRIBED AND SWORN to before me this 26 day of 2012.



  
Notary Public in and for the State of Idaho  
residing at Lewiston, therein.  
My Commission Expires: 9-15-2017

CERTIFICATE OF SERVICE

I hereby certify that on the 26<sup>th</sup> day of April 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith & Cannon PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501

  X   U.S. MAIL  
     HAND DELIVERED  
     OVERNIGHT MAIL  
     TELECOPY (FAX)

  
Sonyalee R. Nutsch

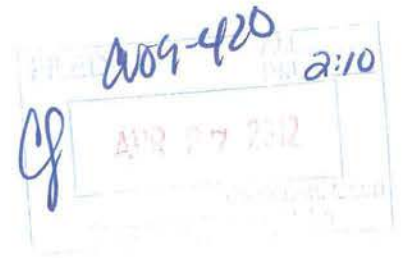


REPORT OF INVESTIGATION LINE OF DUTY AND MISCONDUCT STATUS						1. REPORT DATE (YYMMDD) 20070309	
2. INVESTIGATION OF (X one)						3. STATUS (X as applicable)	
<input checked="" type="checkbox"/> INJURY <input type="checkbox"/> DISEASE <input type="checkbox"/> ILLNESS <input type="checkbox"/> DEATH						<input type="checkbox"/> a. REGULAR OR EAD	
4. TO (Major Army or Air Force Commander) National Guard Bureau Attn: NGB-ARP-DA 111 S. George Mason Dr., Arlington, VA 222040-1382						<input type="checkbox"/> b. CALLED OR ORDERED TO AD FOR <input type="checkbox"/> (1) MORE THAN 30 DAYS <input type="checkbox"/> (2) 30 DAYS OR LESS	
5. NAME OF INDIVIDUAL (Last, First, Middle Initial) LARSON, MALLORY ELIZABETH				6. SSN		7. GRADE E3	
8. ORGANIZATION AND STATION 0145CSBN SPT HHC						c. INACTIVE DUTY TRAINING (Type)	
9. OTHER MILITARY PERSONNEL INVOLVED IN THE SAME INCIDENT						d. SHORT TOUR OF ACTIVE DUTY FOR TRAINING	
NAME (Last, First, Middle Initial) a.				b. SSN	c. GRADE	d. LOG INVESTIGATION MADE (X)	e. DURATION (Applies ONLY to 3.c. and d.)
						YES NO	DATE (YYMMDD) HOUR
POE, DANIELLE RENAI					E3	X	(1) START
							(2) FINISH
10. BASIS FOR FINDINGS (As determined by investigation)							
a. CIRCUMSTANCES	(1) HOUR 1243	(2) DATE (YYMMDD) 20070107	(3) PLACE U.S. HWY 95 N of Cottonwood Idaho County Idaho				
(4) HOW SUSTAINED Loss of control of vehicle traveling 45 MPH in 65 MPH zone, due to slush and ice. Side swiped oppo							
b. MEDICAL DIAGNOSIS Chest pains from air bag deployment, burning pain on skin R pelvic area. Abrasion to nose and Iliac							
c. PRESENT FOR DUTY? (X)		d. IF ABSENT: (X) WITH AUTHORITY <input type="checkbox"/> WITHOUT AUTHORITY <input type="checkbox"/>		(Do not complete 10.e. and f. in death cases.)		e. WAS INTENTIONAL MISCONDUCT OR NEGLECT THE PROXIMATE CAUSE? (X) <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO						f. WAS INDIVIDUAL MENTALLY SOUND? (X) <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	
g. REMARKS PFC Mallory Larsen (driver) and PV2 Danielle (Passenger) were released early from drill at Lewiston due to hazardous weather. At 12:43 Larsen crested a hill on HWY 95, N. Cottonwood, where she encountered slush overlying ice, and severe winds. While slowing to 45 MPH in a 65MPH zone, she was unable to maintain control of her vehicle, crossed the center line and side							
11. FINDINGS (X one. Do not complete in death cases.) <input checked="" type="checkbox"/> IN LINE OF DUTY <input type="checkbox"/> NOT IN LINE OF DUTY - NOT DUE TO OWN MISCONDUCT <input type="checkbox"/> NOT IN LINE OF DUTY - DUE TO OWN MISCONDUCT							
12. INVESTIGATING OFFICER							
a. TYPED NAME (Last, First, Middle Initial) DARNEY, DAVID MICHAEL ARAN				b. GRADE O3	c. BRANCH OF SERVICE AR		d. SSN
e. ORGANIZATION AND STATION 0145CSCSO A S T				f. SIGNATURE << Signed >> DARNEY DAVID MICHAEL ARAN			
13. ACTION BY APPOINTING AUTHORITY							
a. HEADQUARTERS 0145CSBN SPT		b. DATE (YYMMDD) 20070725		a. HEADQUARTERS HQ STARC ID ARNG		b. DATE (YYMMDD) 20071011	
c. (X one. Indicate reasons and substituted findings on back.) <input checked="" type="checkbox"/> APPROVED <input type="checkbox"/> DISAPPROVED							
d. TYPED NAME (Last, First, Middle Initial) JOHNSON, DANIEL T				e. TYPED NAME (Last, First, Middle Initial) FAST, HENRIK MARK			
a. GRADE O4	f. BRANCH OF SERVICE AR	g. SSN		e. GRADE O5	f. BRANCH OF SERVICE AR	g. SSN	
h. SIGNATURE << Signed >> JOHNSON DANIEL T				h. SIGNATURE << Signed >> FAST HENRIK MARK			
15. FINAL APPROVAL (For action of office indicated in item 4.) Chief, National Guard Bureau, Washington, DC 20310-2500    << Signed >> IN LINE OF DUTY FOR MILD CERVICAL STRAIN AND CHEST WALL CONTUSION    SHELLEY TERRY By Authority of the Secretary of the Army    CRAIG R. EKMAN 12 February 2008							

<b>16. NAME OF INDIVIDUAL (Last, First, Middle Initial)</b> LARSON, MALLORY ELIZABETH	<b>17. SSN</b> 	<b>18. GRADE</b> E3
<b>19. APPOINTING AUTHORITY - REASONS AND SUBSTITUTED FINDINGS</b> N/A		
<b>20. REVIEWING AUTHORITY - REASONS AND SUBSTITUTED FINDINGS</b> 		
<b>21. APPROVING AUTHORITY - REASONS AND SUBSTITUTED FINDINGS</b> 		

DD FORM 261 (BACK), OCT 95

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189



Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	Case No: CV09-420
	)	
Plaintiff,	)	AFFIDAVIT OF
	)	MALLORY E. MARTINEZ
vs.	)	
	)	
MALLORY E. LARSON,	)	
	)	
Defendant.	)	
_____	)	

STATE OF IDAHO	)
	) ss.
County of Clearwater	)

MALLORY E. MARTINEZ formerly known as MALLORY E. LARSON, being  
first duly sworn on oath, deposes and says:

1. I am an adult citizen of the United States of America, over the age of  
twenty-one (21), competent to testify as a witness, make this affidavit on personal knowledge  
and am the defendant in this matter.

AFFIDAVIT OF  
MALLORY E. MARTINEZ

2. I am a member of the Idaho National Guard, 145<sup>th</sup> HHC Support Battalion, headquartered in Lewiston, Idaho. I have been a member of the Idaho National Guard for eight (8) years and have achieved the rank of E-5 - specialist.

3. As a member of the Idaho National Guard, unless I have been called to active duty, I am required to attend monthly instruction drills.

4. On January 7, 2007, I was on duty with the Idaho National Guard and was attending one of our regularly scheduled instruction drills in Lewiston, Idaho. On January 7, 2007, my chain of command consisted of my Section Sergeant SSG Tony Rice, First Sergeant Frost and Captain James Deverteuil.

5. Per SSG Rice's verbal orders, on January 7, 2007, I was to provide transportation of a fellow guardsman from the drill to Boise, Idaho.

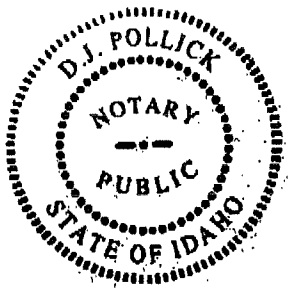
6. At the time of the accident on January 7, 2007, I was on duty with the Idaho National Guard and was acting under my superior's orders by transporting a fellow guardsman to Boise, Idaho.

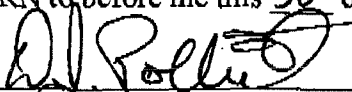
7. After the accident, I reported it to SSG Rice and an investigation was completed to determine if I was on duty. I cooperated in that investigation and received a copy of the report once it was completed. A fair and accurate copy of the report I received is attached as Exhibit A. The social security numbers have been redacted to protect everyone's privacy.

8. After the investigation was completed, the medical bills I incurred for the treatment I received as a result of the accident on January 7, 2007 were paid by the Army National Guard.

  
MALLORY E. MARTINEZ

SUBSCRIBED AND SWORN to before me this 30<sup>th</sup> day of December 2011.



  
Notary Public in and for the State of Idaho  
residing at Peck, Id., therein.  
My Commission Expires: 10-6-2015

AFFIDAVIT OF  
MALLORY E. MARTINEZ

CERTIFICATE OF SERVICE

I hereby certify that on the 26<sup>th</sup> day of April 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith & Cannon PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501

  X   U.S. MAIL  
     HAND DELIVERED  
     OVERNIGHT MAIL  
     TELECOPY (FAX)

  
Sonyalee R. Nutsch

Designed using Perform Pro. WWS/DIGB, Oct 95



16. NAME OF INDIVIDUAL (Last, First, Middle Initial) LARSON, MALLORY ELIZABETH	17. SSN [REDACTED]	18. GRADE E3
19. APPOINTING AUTHORITY - REASONS AND SUBSTITUTED FINDINGS N/A		
20. REVIEWING AUTHORITY - REASONS AND SUBSTITUTED FINDINGS		
21. APPROVING AUTHORITY - REASONS AND SUBSTITUTED FINDINGS		

DD FORM 261 (BACK), OCT 95

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

CV09-420 2.10  
4

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER


WILLIAM P. TEURLINGS,	)	
	)	Case No: CV09-420
	)	
Plaintiff,	)	
	)	NOTICE OF HEARING
vs.	)	
	)	
MALLORY E. LARSON,	)	
	)	
Defendant.	)	
_____)		

TO: Plaintiff, WILLIAM P. TEURLINGS, and to your attorney of record, NED  
A. CANNON:

PLEASE TAKE NOTICE, that the undersigned will call up for hearing,  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT before The Honorable Carl  
B. Kerrick at the Nez Perce County Courthouse on Tuesday, the 12<sup>th</sup> day of June, 2012, at  
9:00 a.m., or as soon thereafter as counsel may be heard.

DATED this 26<sup>th</sup> day of April 2012.

CLEMENTS, BROWN & McNICHOLS, P.A.

By   
SONYALEE R. NUTSCH  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 26<sup>th</sup> day of April 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
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(208) 746-8421 – facsimile

X U.S. MAIL  
— HAND DELIVERED (via Valley Messenger)  
— OVERNIGHT MAIL  
— TELECOPY (FAX)

  
Sonyalee R. Nutsch

Sonyalee R. Nutsch  
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Lewiston, ID 83501  
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ISB # 6189



Attorneys for Defendant

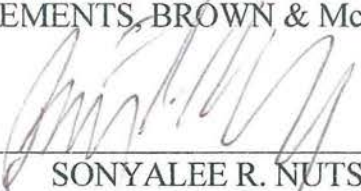
IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	
	)	Case No: CV09-420
	)	
Plaintiff,	)	NOTICE OF SERVICE
	)	
vs.	)	
	)	
MALLORY E. LARSON,	)	
	)	
Defendants	)	
	)	

I, Sonyalee R. Nutsch, attorney for defendant, pursuant to I.R.C.P. 34(d) certify that on the 10th day of May, 2012, DEFENDANT'S SECOND REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF were served on counsel for plaintiff, Ned A. Cannon.

DATED this 10th day of November 2012.

CLEMENTS, BROWN & McNICHOLS, P.A.

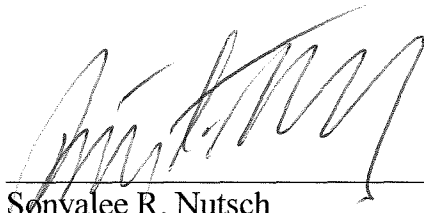
By   
SONYALEE R. NUTSCH  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith, Cannon & Bond, PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501

☐ U.S. MAIL  
☒ HAND DELIVERED (via Valley Messenger)  
☐ OVERNIGHT MAIL  
☐ TELECOPY (FAX)

for   
\_\_\_\_\_  
Sonyalee R. Nutsch



Mark C. Peterson, ISB No. 6477  
Andrea J. Rosholt, ISB No. 8895  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
101 S. Capitol Blvd., 10th Floor  
Post Office Box 829  
Boise, Idaho 83701  
Telephone (208) 345-2000  
Facsimile (208) 385-5384  
mcp@moffatt.com  
ajr@moffatt.com  
23798.0008

Attorneys for Applicant  
Swift Transportation Company

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,  
Plaintiff,

vs.

MALLORY E. LARSON,  
Defendant.

Case No. CV-2009-0420

**MOTION TO INTERVENE**

COMES NOW Swift Transportation Company ("Applicant"), by and through their counsel of record, MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED, and pursuant to Rule 24, Idaho Rules of Civil Procedure, hereby moves to intervene in the above-captioned case. Applicant is entitled to intervene because (1) Applicant is an employer engaged in interstate commerce who has compensated Teurlings related to the motor vehicle accident at

issue in this litigation; and (2) Applicant is entitled to subrogation pursuant to Idaho's worker's compensation laws, codified at Title 72, Chapter 2 of the Idaho Code.

This Motion is supported by a Memorandum in Support of Motion to Intervene and Affidavit of Mark A. Peterson filed contemporaneously herewith. Further, in accordance with the requirements of Rule 24(c).

DATED this 25th day of May, 2012.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By   
Andrea J. Rosholt – Of the Firm  
Attorneys for Applicant  
Swift Transportation Company



### CERTIFICATE OF SERVICE

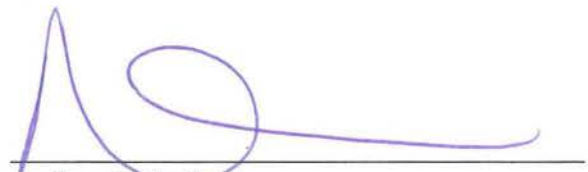
I HEREBY CERTIFY that on this 25th day of May, 2012, I caused a true and correct copy of the foregoing **MOTION TO INTERVENE** to be served by the method indicated below, and addressed to the following:

Sonyalee R. Nutsch  
CLEMENTS BROWN & MCNICHOLS, PA  
321 13th St.  
P.O. Box 1510  
Lewiston, ID 83501-1510  
Facsimile (208) 743-9295  
*Attorneys for Defendant*

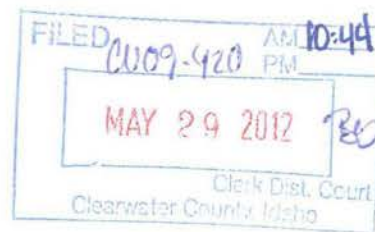
☒ U.S. Mail, Postage Prepaid  
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☐ Facsimile

Ned A. Cannon  
SMITH & CANNON PLLC  
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Facsimile (208) 746-8421  
*Attorneys for Plaintiff*

☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile



Andrea J. Rosholt



Mark C. Peterson, ISB No. 6477  
Andrea J. Rosholt, ISB No. 8895  
MOFFATT, THOMAS, BARRETT, ROCK &  
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Boise, Idaho 83701  
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Facsimile (208) 385-5384  
mcp@moffatt.com  
ajr@moffatt.com  
23798.0008

Attorneys for Applicant  
Swift Transportation Company

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,  
Plaintiff,

vs.

MALLORY E. LARSON,  
Defendant.

Case No. CV-2009-0420

**MEMORANDUM IN SUPPORT OF  
MOTION TO INTERVENE**

**I. INTRODUCTION**

This memorandum is submitted in support of Swift Transportation Company's ("Swift" or "Applicant") motion to intervene. Applicant applies for intervention as a matter of right under Idaho Rules of Civil Procedure § 24(a)(2) or, in the alternative, apply for permissive

ORIGINAL

intervention pursuant to Rule 24(b)(2). Applicant has a significant interest in the outcome of this litigation.

## **II. STATEMENT OF FACTS**

Plaintiff William P. Teurlings ("Teurlings") was injured in a January 1, 2007 motor vehicle accident between Teurlings and Mallory E. Larson. At the time of the accident, Teurlings was employed and acting within the scope of his employment with Applicant. Teurlings tendered a worker's compensation claim to Applicant in connection with the accident. On April 23, 2008, Applicant, pursuant to a Compromise and Release, agreed to pay Teurlings a Fifty-Five Thousand Dollar (\$55,000.00) award. The award was made pursuant to California's worker's compensation laws.

Subsequently Teurlings filed a civil complaint on January 6, 2009, in Nez Perce County, Case No. 2009-0000025, seeking damages for injuries sustained in the January 1, 2007, motor vehicle accident against Mallory E. Larson ("Larson" or "Defendant"). Upon motion, the court transferred venue to Clearwater County, Case No. CV-2009-0420, where the case is pending.

On July 20, 2010, counsel on behalf of Applicant sent a letter by certified mail to both Sonyalee Nutsch and Ned Cannon, Teurlings and Larsons' respective counsel, asserting its rights to subrogation in the pending proceeding. See Affidavit of Mark C. Peterson ("Peterson Aff."), Exhibit A.

On June 13, 2011, Mr. Peterson sent a letter by certified mail to both Teurlings and Larson's respective counsel, asking them to provide him with the status of the litigation. Peterson Aff., Exhibit B.

On June 20, 2011, Ms Nutsch responded to Mr. Peterson's letter indicating that her client was a member of the Idaho National Guard which was called up to active duty, and that as a result, the case had been stayed until she returned home in September of 2011. Peterson Aff., Exhibit C.

On September 27, 2011, Mr. Peterson sent a follow-up letter to Ms. Nutsch asking her to advise him of whether her client returned or when that should occur. Peterson Aff., Exhibit D.

On September 29, 2011, Ms. Nutsch responded to Mr. Peterson's letter advising that her client returned from active duty and that the parties had signed a stipulation to lift the stay that would be filed with the Court. Ms. Nutsch indicated that once the Court entered the Order lifting the stay, they would proceed with the case. Peterson Aff., Exhibit E.

On January 9, 2012, Mr. Peterson wrote a letter to Ms. Nutsch thanking her for advising him that the stay had been lifted based upon the return of her client from the military service. Mr. Peterson indicated that his clients continue to assert their subrogation rights under the claim noted in his July 20, 2010, letter and that his clients are willing to participate in settlement discussions concerning the resolution of the case. Peterson Aff., Exhibit F.

As there was no response to Mr. Peterson's January 9, 2012, Mr. Peterson sent another letter to both Ms. Nutsch and Mr. Cannon on March 7, 2012, indicating that his clients continued to assert their interest in the current tort litigation, and to please let him know whether there had been any effort to try and resolve the matter short of trial. He explained that his clients would like to be included in any mediation or other efforts to settle the case. Peterson Aff., Exhibit G.

As outlined above, counsel for Applicant followed up with several letters reiterating Applicants' right to subrogation and seeking information concerning the status of the proceeding, including whether any settlement negotiations had taken place. Several months have gone by, and Mr. Peterson has yet to receive a response to his letters of January and March, 2012.

According to the Court's repository, Defendant moved for summary judgment on April 27, 2012. A hearing on Summary Judgment is currently set for June 6, 2012. In order to protect its right to subrogation, Applicant has presented this court with a motion to intervene.

### **I. STANDARD FOR INTERVENTION**

The Idaho Rules of Civil Procedure allow a party to intervene as a matter of right or to intervene with permission. *See* IDAHO R. CIV. P. 24. Intervention as a matter of right is permitted upon the filing of a timely application under the following circumstances:

(1) when a statute of the state of Idaho confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

IDAHO R. CIV. P. 24(a). Alternatively, permissive intervention is warranted when "a statute confers a conditional right to intervene" or "an applicant's claim or defense and the main action have a question of law or fact in common." IDAHO R. CIV. P. 24(b). As demonstrated below, Applicant satisfies either standard and should be allowed to intervene in this action.

Intervention as a matter of right is considered a mixed question of law and fact involving the discretion of the trial judge. *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377 (1991). However, both Rule 24 and statutes providing for intervention are to be liberally construed. *Herzog v. City of Pocatello*, 82 Idaho 505, 509 (1960). Further, pertinent

factual allegations in a motion to intervene should be assumed to be true. *Id.* It is proper to allow intervention where an applicant shows merely that he “may” be bound by the judgment or representation as to him “may” be inadequate. *Duff v. Draper*, 96 Idaho 299, 302 (1974). A motion for intervention is considered timely when it is filed before trial. *Anderson v. Ferguson*, 56 Idaho 554 (1936); *see also Duff*, 96 Idaho at 301-302. Finally, Idaho Rules of Civil Procedure § 24(c) requires that a motion to intervene “. . . shall state the grounds therefor and shall be accompanied by pleadings setting forth the claim or defense for which intervention is sought.” IDAHO R. CIV. P. 24(c).

## **II. ARGUMENT**

### **A. Applicant Is Entitled To Intervene As A Matter of Right.**

Applicant is entitled to Intervene as a matter of right pursuant to Idaho Rules of Civil Procedure § 24(a) under either subsection (1) or (2).

First, Applicant is entitled to intervene as a matter of right pursuant to Rule 24(a)(1). The worker’s compensation statutes contemplate an employer as a party to the litigation or settlement of any claim against a third-party tortfeasor. Pursuant to Idaho’s worker’s compensation laws, codified at Title 72, Chapter 2 of the Idaho Code, an employer who has paid compensation to an employee “shall be subrogated to the rights of the employee, to recover against such third party to the extent of the employer’s compensation liability.” Idaho Code § 72-223 (3). Idaho Code § 72-202 provides that “this law shall affect the liability of employers engaged in interstate commerce.”

Under Idaho law, the employer is entitled to institute an action against a third-party on behalf of an employee either jointly with the employee or on its own accord if the employee refuses to participate. *See* Idaho Code § 72-223.

Idaho Code § 72-223(3) confers on an employer the right to join an action between its employee and a third-party tortfeasor to recover damages. In return for this right, the statute awards a proportionate share of the costs and attorney's fees incurred by the employee in obtaining such recovery. Idaho Code § 72-223(4). The right to proportionate recovery is abrogated where an employee alleges or asserts a position in the third-party claim adverse to the employer. Idaho Code § 72-223(4)(1)(b).

Applying the foregoing statutory authority, Applicant respectfully requests that this Court grant its motion to intervene as a matter of right pursuant to Idaho Rules of Civil Procedure 24(a)(1). Applicant is an employer engaged in interstate commerce. Applicant has paid compensation to its employee Teurlings related to the motor vehicle accident at issue in this litigation. As such, Applicant is entitled to be subrogated to the rights of Teurlings.

Secondly, Applicant is entitled to intervene as a matter of right pursuant to Rule 24(a)(2). Rule 24(a)(2) further permits that an applicant can intervene, as a matter of right "when the applicant claims an interest relating to the property or transaction which is subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." *See* IDAHO R. CIV. P. 24(a)(2).

In the present case, Applicant is claiming a statutory subrogation right to any recovery by Teurlings. Although Applicant has asserted its right to subrogation and has requested information regarding the status of the proceeding, the parties have been non-responsive. A summary judgment motion is pending. The disposition of the action, may, as a practical matter, impair or impede Applicant's ability to protect its interest. Additionally, based on the actions – or inactions – of the parties, Applicant's interest is not adequately represented by



the existing parties. As such, Applicant respectfully requests that this Court grant its motion to intervene pursuant to Idaho Rules of Civil Procedure 24(a)(2).

**B. Applicant Is Entitled To Permissive Intervention**

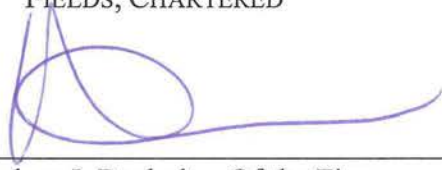
In the alternative to Intervention as a matter of right, Applicant is entitled to permissive intervention. Permissive intervention is warranted when “a statute confers a conditional right to intervene” or “an applicant’s claim or defense and the main action have a question of law or fact in common.” IDAHO R. CIV. P. 24(b). As provided, Idaho Code § 72-223(3) confers on Applicant, the right to join an action between its employee and a third-party tortfeasor to recover damages. Additionally, Applicant’s claim directly goes to the element of damages in the present action. Pursuant to Idaho Code § 72-223(3), Applicant has all the claims or defenses in the main action as the Plaintiff against Defendant.

**III. CONCLUSION**

For the foregoing reasons, Applicant respectfully requests that the Court grant its Motion to Intervene and order that Swift shall forthwith be a party to the instant lawsuit.

DATED this 25th day of May, 2012.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By   
\_\_\_\_\_  
Andrea J. Rosholt – Of the Firm  
Attorneys for Applicant  
Swift Transportation Company

## CERTIFICATE OF SERVICE

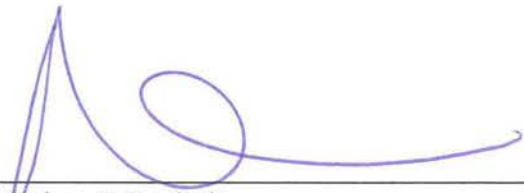
I HEREBY CERTIFY that on this 25th day of May, 2012, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE** to be served by the method indicated below, and addressed to the following:

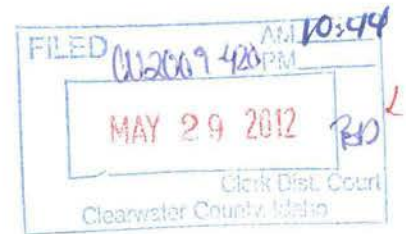
Sonyalee R. Nutsch  
CLEMENTS BROWN & McNICHOLS, PA  
321 13th St.  
P.O. Box 1510  
Lewiston, ID 83501-1510  
Facsimile (208) 743-9295  
*Attorneys for Defendant*

☒ U.S. Mail, Postage Prepaid  
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Ned A. Cannon  
SMITH & CANNON PLLC  
508 Eighth St.  
Lewiston, ID 83501  
Facsimile (208) 746-8421  
*Attorneys for Plaintiff*

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\_\_\_\_\_  
Andrea J. Rosholt



Mark C. Peterson, ISB No. 6477  
Andrea J. Rosholt, ISB No. 8895  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
101 S. Capitol Blvd., 10th Floor  
Post Office Box 829  
Boise, Idaho 83701  
Telephone (208) 345-2000  
Facsimile (208) 385-5384  
mcp@moffatt.com  
ajr@moffatt.com  
23798.0008

Attorneys for Applicant  
Swift Transportation Company

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,  
Plaintiff,

vs.

MALLORY E. LARSON,  
Defendant.

Case No. CV-2009-0420

**AFFIDAVIT OF MARK C. PETERSON  
IN SUPPORT OF MOTION TO  
INTERVENE**

STATE OF IDAHO     )  
                                      ) ss.  
County of Ada         )

MARK C. PETERSON, having been duly sworn upon oath, deposes and states as follows:

1. I am an attorney employed by MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED, counsel of record for Swift Transportation Company ("Applicant"). As such, I am personally familiar with the facts and circumstances contained herein.

2. At the time of the motor vehicle accident that is the subject of this litigation, the Plaintiff in this action, William P. Teurlings ("Teurlings"), was employed by Applicant. Teurlings filed a workers compensation claim with Applicant. Applicant, by and through its surety, paid Teurlings' workers compensation benefits. As a result, Applicant is statutorily entitled to be subrogated to any recovery received by Teurlings.

3. On July 20, 2010, I sent a letter by certified mail to both Sonyalee Nutsch and Ned Cannon, Teurlings and Larsons' respective counsel, asserting its rights to subrogation in the pending proceeding. A true and correct copy of said letter is attached hereto as **Exhibit A**.

4. On June 13, 2011, I sent a letter by certified mail to both Teurlings and Larson's respective counsel, asking them to provide him with the status of the litigation. A true and correct copy of said letter is attached hereto as **Exhibit B**.

5. On June 20, 2011, Ms Nutsch responded to my letter indicating that her client was a member of the Idaho National Guard and was called up to active duty, and that as a result, the case had been stayed until she returned home in September of 2011. A true and correct copy of said letter is attached hereto as **Exhibit C**.

6. On September 27, 2011, I sent a follow-up letter to Ms. Nutsch asking her to advise me of whether her client had returned or when that would occur. A true and correct copy of said letter is attached hereto as **Exhibit D**.

7. On September 29, 2011, Ms. Nutsch responded to my letter advising that her client returned from active duty, and that the parties had signed a stipulation to lift the stay that would be filed with the Court. Ms. Nutsch indicated that once the Court entered the Order lifting the stay, they would proceed with the case. A true and correct copy of said letter is attached hereto as **Exhibit E**.

8. On January 9, 2012, I wrote a letter to Ms. Nutsch thanking her for advising me that the stay had been lifted based upon the return of her client from the military service. I indicated that my clients continue to assert its subrogation rights under the claim noted in the July 20, 2010, letter and that my clients are willing to participate in settlement discussions concerning the resolution of the case. A true and correct copy of said letter is attached hereto as **Exhibit F**.

9. As there was no response to my January 9, 2012, I sent another letter to both Ms. Nutsch and Mr. Cannon on March 7, 2012, indicating that my clients continued to assert their interest in the current tort litigation, and to please let me know whether there had been any effort to try and resolve the matter short of trial. I explained that my clients would like to be included in any mediation or other efforts to settle the case. A true and correct copy of said letter is attached hereto as **Exhibit G**.

10. As outlined above, I followed up with several letters reiterating Applicants' right to subrogation and seeking information concerning the status of the proceeding,

including whether any settlement negotiations had taken place. Several months have gone by, and I have yet to receive a response to my letters of January and March, 2012.

11. Plaintiff has moved for summary judgment and a summary judgment hearing is currently scheduled in this matter for June 12, 2012.

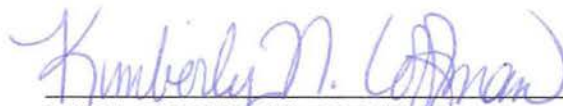
12. In order to protect its interest, Swift, by and through its counsel has filed a Motion to Intervene and Memorandum in Support of the Motion to Intervene concurrently herewith.

Further your affiant sayeth naught.



Mark C. Peterson

SUBSCRIBED AND SWORN to before me this 24th day of May, 2012.



NOTARY PUBLIC FOR IDAHO

Residing at Meridian

My Commission Expires 03-16-2015



## CERTIFICATE OF SERVICE

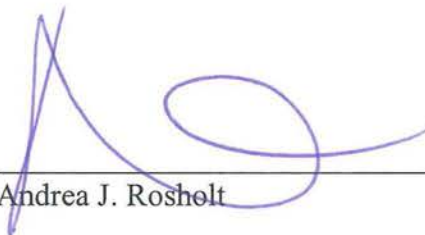
I HEREBY CERTIFY that on this 25th day of May, 2012, I caused a true and correct copy of the foregoing **AFFIDAVIT OF MARK C. PETERSON IN SUPPORT OF MOTION TO INTERVENE** to be served by the method indicated below, and addressed to the following:

Sonyalee R. Nutsch  
CLEMENTS BROWN & MCNICHOLS, PA  
321 13th St.  
P.O. Box 1510  
Lewiston, ID 83501-1510  
Facsimile (208) 743-9295  
*Attorneys for Defendant*

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Ned A. Cannon  
SMITH & CANNON PLLC  
508 Eighth St.  
Lewiston, ID 83501  
Facsimile (208) 746-8421  
*Attorneys for Plaintiff*

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\_\_\_\_\_  
Andrea J. Rosholt



# Moffatt Thomas

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Mindy M. Willman

Robert E. Bakes, *of counsel*

*Willis C. Moffatt, 1907-1980*  
*Kirk R. Helvie, 1956-2003*

July 20, 2010  
*via Certified Mail*

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Boise Idaho 83701 0829

208 345 2000  
800 422 2889  
208 385 5384 Fax  
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PO Box 1510  
Lewiston, ID 83501

Ned A. Cannon  
Smith, Cannon & Bond, PLLC  
508 Eighth St.  
Lewiston, ID 83501

**Re: Teurlings v. Larson, Nez Perce County Case No. CV09-00025**  
MTBR&F File No. 23798.0008

Dear Ms. Nutsch and Mr. Cannon:

I represent Swift Transportation Company (Swift), the employer for William Teurlings (Teurlings), and Gallagher Bassett Services. The surety for Swift, has paid workers' compensation benefits to Teurlings for the injuries Teurlings sustained in a traffic accident while working as a Swift employee. These workers' compensation benefits were paid pursuant to California's workers' compensation law because Teurlings is a California employee.

To the extent that Teurlings is entitled to an award of damages against Mallory Larson (Larson) for the injuries Teurlings sustained in the traffic accident, the surety has the right to recover from all damages awarded Teurlings as reimbursement for the compensation it has paid to Teurlings. Cal. Labor Code §§ 3852, 3856; *Scalice v. Performance Cleaning Systems*, 57 Cal. Rptr. 2d 711 (Ct. App. 1996). The surety intends to assert this right by filing a lien on the judgment as provided for by California law. Cal. Labor Code §§ 3856, 3862.

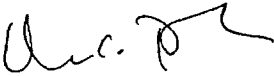
Because the surety has paid worker's compensation benefits to Teurlings, Teurlings may not settle his case against Larson, a third-party, without giving the employer/surety notice and an opportunity to recover the compensation it has paid to Teurlings. Cal. Labor Code § 3860(a). A settlement will not be effective without my clients' consent. *Coe v. State Farm Mut. Auto. Ins. Co.*, 136 Cal. Rptr. 331 (Ct. App. 1977). If Teurlings and Larson are interested in settling the case, my clients are willing to participate in settlement negotiations.



Sonyalee R. Nutsch  
Ned A. Cannon  
July 20, 2010  
Page 2

If you would like to discuss this matter further, please contact me at the above number.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark C. Peterson', with a stylized flourish at the end.

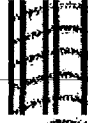
Mark C. Peterson

MCP/cs

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<p>1. Article Addressed to:</p> <p><i>Ned A. Cannon</i>  <i>Smith Cannon &amp; Bond Plc</i>  <i>508 Eighth St.</i>  <i>Lewiston, ID 83501</i></p>		<p>B. Received by (Printed Name)  <i>S</i></p>	<p>C. Date of Delivery  <i>2/12/10</i></p>
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		<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>	
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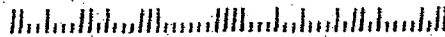
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MOFFATT, THOMAS, BARRETT  
ROCK & FIELDS, CHTD

Teurlings

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<p>1. Article Addressed to:</p> <p><i>Songalee R. Nutsch  Clements Brown &amp;  McNichols PA  PO Box 1510  Lewiston, ID 83501</i></p>		<p>B. Received by (Printed Name)  <i>M Hayes</i></p> <p>C. Date of Delivery</p>	
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MOFFATT, THOMAS, BARRETT  
ROCK & FIELDS, CHTD

23798.0008

829



# Moffatt Thomas

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

Boise  
Idaho Falls  
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*Willis C. Moffatt, 1907-1980*  
*Eugene C. Thomas, 1931-2010*  
*Kirk R. Helvie, 1956-2003*

Mailing Address  
PO Box 829  
Boise ID 83701-0829

Physical Address  
US Bank Plaza  
101 S Capitol Blvd 10th Fl  
Boise ID 83702-7710

208 345 2000  
800 422 2889  
208 385 5384 Fax  
www.moffatt.com

June 13, 2011  
*via Certified Mail*

Sonyalee R. Nutsch  
Clements, Brown & McNichols, P.A.  
321 13th Street  
PO Box 1510  
Lewiston, ID 83501

Ned A. Cannon  
Smith, Cannon & Bond, PLLC  
508 Eighth St.  
Lewiston, ID 83501

**Re: Teurlings v. Larson, Nez Perce County Case No. CV09-00025**  
MTBR&F File No. 23798.0008

Dear Ms. Nutsch and Mr. Cannon:

As you know, I represent Swift Transportation Company (Swift), the employer for William Teurlings (Teurlings), and Gallagher Bassett Services. Please provide me with the status of this litigation.

If you would like to discuss this matter, please contact me at the above number.

Sincerely,



Mark C. Peterson

/jy

cc: Cathy Nation

EXHIBIT

B

204



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<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>		A. Signature <i>Sarah Riedle</i> <input type="checkbox"/> Agent <input checked="" type="checkbox"/> Addressee	
1. Article Addressed to: Ned A. Cannon Smith Cannon & Bond, P.C. 508 Eighth St. Lewiston, ID 83501		B. Received by (Printed Name) <i>Sarah Riedle</i> C. Date of Delivery <i>6/15/11</i> D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If YES, enter delivery address below:	
		3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
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7006 2150 0000 4462 8438			
PS Form 3811, February 2004		Domestic Return Receipt 102595-02-M-1540	

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>		A. Signature <i>Jean Morton</i> <input type="checkbox"/> Agent <input checked="" type="checkbox"/> Addressee	
1. Article Addressed to: Songalee B. Nutsch Clementz Brown & McNichols PO Box 1510 Lewiston, ID 83501		B. Received by (Printed Name) <i>Jean Morton</i> C. Date of Delivery <i>6-15-11</i> D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If YES, enter delivery address below:	
		3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
2. Article Number (Transfer from service label)		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
7006 2150 0000 4462 8445			
PS Form 3811, February 2004		Domestic Return Receipt 102595-02-M-1540	

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Tenulings  
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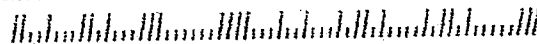
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JUN 22 2011

MOFFATT, THOMAS, BARRETT,  
ROCK & FIELDS, CHTD.  
Robert P. Brown  
Michael E. McNichols  
Cynthia L. Mosher\*  
Sonyalee R. Nutsch\*  
Eric K. Peterson\*  
Bentley G. Stromberg

\*Admitted in Idaho  
and Washington

V.R. Clements  
(1896-1982)  
Reed Clements  
(Retired)  
Philip E. Peterson  
(1922-2003)

20 June 2011

Mark C. Peterson  
Moffatt Thomas  
P. O. Box 829  
Boise, ID 83701-0829

**Re: Teurlings v. Larson**  
**Case No: CV09-00025**

Dear Mr. Peterson:

I am in receipt of your letter dated June 13, 2011, wherein you requested the status of the case of *Teurlings v. Larson*, Case No: CV09-00025. My client, Mallory Larson, is a member of the Idaho National Guard which has been called up to active duty. As a result of that, the case has been stayed until she returns home. It is my understanding from my communication with my client that she should be home some time in September of 2011.

Please contact me if you have any questions or concerns.

Sincerely,

CLEMENTS, BROWN & McNICHOLS, P.A.

  
SONYALEE R. NUTSCH

SRN/cam

cc: Ned Cannon  
Steve Johnson

Claim No: 01024225012007010701



# Moffatt Thomas

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Idaho Falls  
Pocatello

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Mark S. Prusynski	David P. Gardner	Jetta A. Hatch
Stephen R. Thomas	Julian E. Gabiola	
Glenna M. Christensen	Kimberly D. Evans Ross	Robert E. Bakes, <i>of counsel</i>
Gerald T. Husch	Jon A. Stenquist	
Scott L. Campbell	Mark C. Peterson	<i>Willis C. Moffatt, 1907-1980</i>
Robert B. Burns	Tyler J. Anderson	<i>Eugene C. Thomas, 1931-2010</i>
Michael E. Thomas	Andrew J. Waldera	<i>John W. Barrett, 1931-2011</i>
Patricia M. Olsson	Dylan B. Lawrence	<i>Kirk R. Helvie, 1956-2003</i>

September 27, 2011

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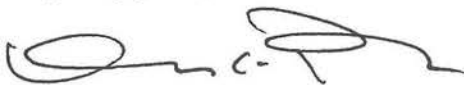
Sonyalee R. Nutsch  
Clements, Brown & McNichols, P.A.  
321 13th Street  
PO Box 1510  
Lewiston, ID 83501

Re: **Teurlings v. Larson**  
**Nez Perce County Case No. CV09-00025**  
MTBR&F File No. 23798.0008

Dear Ms. Nutsch:

It is my understanding that your client was set to return for military service during this time frame. Please advise whether your client has returned and, if not, when that should occur. Thank you for your cooperation regarding this matter.

Very truly yours,



Mark C. Peterson  
mcp@moffatt.com

MCP/cs  
cc: Cathy Nation



RECEIVED

OCT 03 2011

MOFFATT, THOMAS, BARRETT,  
ROCK & FIELDS, CHTD.

23798.0008

Robert P. Brown  
Michael E. McNichols  
Cynthia L. Mosher\*  
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Eric K. Peterson\*  
Bentley G. Stromberg

CLEMENTS, BROWN & McNICHOLS, P.A.  
LAWYERS

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29 September 2011

V.R. Clements  
(1896-1982)  
Reed Clements  
(Retired)

Philip E. Peterson  
(1922-2003)

Mark C. Peterson  
Moffatt Thomas  
P. O. Box 829  
Boise, ID 83701-0829

Re: Teurlings v. Larson  
Case No: CV09-00025

Dear Mr. Peterson:

In response to your letter of September 27, 2011, please be advised that my client has returned from active duty with the Idaho National Guard. The parties have signed a Stipulation to lift the stay that will be filed with the Court. Once the Court enters the Order lifting the stay, we will proceed with this case.

Please contact me if you have any questions or concerns.

Sincerely,

CLEMENTS, BROWN & McNICHOLS, P.A.

  
SONYALEE R. NUTSCH

SRN/cam

cc: Ned Cannon  
Steve Johnson

Claim No: 01024225012007010701

EXHIBIT

E

209



# Moffatt Thomas

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Patricia M. Olsson	Paul D. McFarlane	
Christine E. Nicholas	C. Edward Cather III	* WA license only

January 9, 2012

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Sonyalee R. Nutsch  
Clements, Brown & McNichols, P.A.  
321 13th Street  
PO Box 1510  
Lewiston, ID 83501

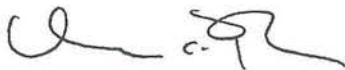
**Re: Teurlings v. Larson, Nez Perce County Case No. CV09-00025**  
MTBR&F File No. 23798.0008

Dear Sonyalee:

Thank you for your letter advising that the stay has been lifted based upon the return of your client from military service. My clients continue to assert their subrogation rights under this claim as noted in my July 10, 2010, letter. Further, my clients are willing to participate in settlement discussions concerning the resolution of this case.

Thank you for your cooperation as it relates to this matter.

Very truly yours,



Mark C. Peterson

MCP/cs

cc: Ned A. Cannon  
Cathy Nation

EXHIBIT

F

210

# Moffatt Thomas

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Boise  
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Pocatello

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John S. Simko  
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Matthew J. McGee  
Mindy M. Willman  
Andrea J. Rosholt\*  
Jetta Harch Mathews

Robert E. Bakes, *of counsel*  
Norman M. Semanko, *of counsel*

*Willis C. Moffatt, 1907-1980*  
*Eugene C. Thomas, 1931-2010*  
*John W. Barrett, 1931-2011*  
*Kirk R. Helvie, 1956-2003*

\* WA license only

March 7, 2012

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Sonyalee R. Nutsch  
Clements, Brown & McNichols, P.A.  
321 13th Street  
PO Box 1510  
Lewiston, ID 83501

**Re: Teurlings v. Larson, Nez Perce County Case No. CV09-00025**  
MTBR&F File No. 23798.0008

Dear Sonyalee:

As you know I represent Swift Transportation Company, the employer for William Teurlings, and Gallagher Bassett Services, as it relates to their subrogation interest. Swift and Gallagher Bassett continue to assert their interest in the current tort litigation. Please let me know whether there has been any effort to try and resolve this matter short of trial. My clients would like to be included in any mediation or other efforts to settle the case.

Thank you for your assistance regarding this matter.

Sincerely,



Mark C. Peterson  
mcp@moffatt.com

MCP/cs





# Moffatt Thomas

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Idaho Falls  
Pocatello

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March 7, 2012

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508 Eighth St.  
Lewiston, ID 83501

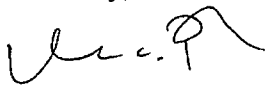
**Re: Teurlings v. Larson, Nez Perce County Case No. CV09-00025**  
MTBR&F File No. 23798.0008

Dear Ned:

As you know I represent Swift Transportation Company, the employer for William Teurlings, and Gallagher Bassett Services, as it relates to their subrogation interest. Swift and Gallagher Bassett continue to assert their interest in the current tort litigation. Please let me know whether there has been any effort to try and resolve this matter short of trial. My clients would like to be included in any mediation or other efforts to settle the case.

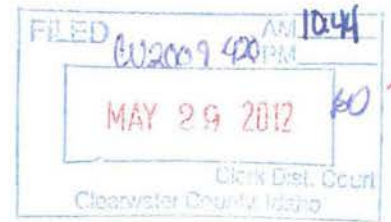
Thank you for your assistance regarding this matter.

Sincerely,



Mark C. Peterson  
mcp@moffatt.com

MCP/cs



Mark C. Peterson, ISB No. 6477  
Andrea J. Rosholt, ISB No. 8895  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
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mcp@moffatt.com  
ajr@moffatt.com  
23798.0008

Attorneys for Applicant  
Swift Transportation Company

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,  
Plaintiff,

vs.

MALLORY E. LARSON,  
Defendant.

Case No. CV-2009-0420

**NOTICE OF HEARING RE: MOTION  
TO INTERVENE**

**TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:**

PLEASE TAKE NOTICE that Swift Transportation Company's (hereinafter "Applicant"), Motion to Intervene will be called up for hearing on **Tuesday, June 12, 2012, at 9:00 a.m.**, or as soon thereafter as counsel can be heard, before the Honorable Carl B. Kerrick at the Nez Perce County Court.

**ORIGINAL**

PLEASE TAKE FURTHER NOTICE that counsel for Applicant, Andrea J. Rosholt, will appear via telephonically, with the Court to initiate the call.

DATED this 25th day of May, 2012.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By   
Andrea J. Rosholt – Of the Firm  
Attorneys for Applicant Swift  
Transportation Company

## CERTIFICATE OF SERVICE

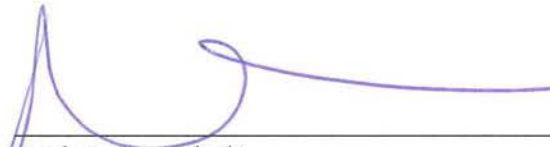
I HEREBY CERTIFY that on this 25th day of May, 2012, I caused a true and correct copy of the foregoing **NOTICE OF HEARING RE: MOTION TO INTERVENE** to be served by the method indicated below, and addressed to the following:

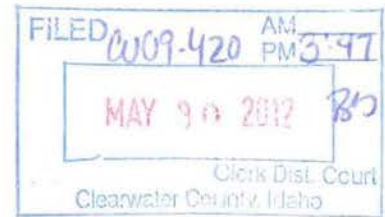
Sonyalee R. Nutsch  
CLEMENTS BROWN & McNICHOLS, PA  
321 13th St.  
P.O. Box 1510  
Lewiston, ID 83501-1510  
Facsimile (208) 743-9295  
*Attorneys for Defendant*

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SMITH & CANNON PLLC  
508 Eighth St.  
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*Attorneys for Plaintiff*

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☐ Facsimile

  
\_\_\_\_\_  
Andrea J. Rosholt



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SMITH & CANNON PLLC  
508 Eighth Street  
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Telephone: (208) 743-9428  
Fax: (208) 746-8421

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendant.

Case No.: CV 09-420

**MEMORANDUM IN OPPOSITION TO  
MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

Ms. Larson is not entitled to summary judgment as a matter of law. She has failed to establish that she was "acting within the course and scope of [her] employment or duties" at the time of the accident pursuant to Idaho Code § 6-904(4).

**II. FACTS**

The automobile accident between Plaintiff and Mallory Larson occurred on January 7, 2007 at 12:43 p.m. Ms. Larson was returning home after completing her drills with the Idaho

National Guard. The following facts indicate that Ms. Larson was not “acting within the course and scope of her employment or duties” at the time of the accident:

- Ms. Larson was not reimbursed for her mileage for her travel to and from National Guard training.
- Ms. Larson has submitted no evidence that the National Guard directed her route home from Lewiston to Boise.
- Ms. Larson was driving her own vehicle home after completing her monthly training duty.
- Ms. Larson has submitted no evidence that the National Guard provided her a car, approved of the car she was using, or performed any inspections of the car she was using on the day of the accident.
- Ms. Larson’s obligation with the National Guard included once-a-month training that began on January 5th and continued until her drills completed on January 7th.
- Ms. Larson’s monthly training duties did not give her full-time status; she maintained a civilian job as a food service worker for the Idaho Department of Corrections.
- The National Guard did not control Ms. Larson's conduct at the time of the accident. She was free to take any route on her return trip home.
- Ms. Larson has submitted no evidence that she was hired by the National Guard to drive or transport other guardsmen.
- Ms. Larson has submitted no evidence that the National Guard provided her training on safe travel from Boise to Lewiston and home again.
- At the time of the accident, Ms. Larson was not driving between assignments. She was returning home after completing training.



- Mr. Rice has submitted affidavits stating that Ms. Larson was on duty until 11:59 p.m. on January 7th, but has made no mention of the hour when he regularly released guardsmen on scheduled training days.

As will be argued more fully below, Idaho law does not support Ms. Larson's position that she was acting within the course and scope of her employment with the National Guard at the time of the accident.

## II. STANDARD OF REVIEW

The Idaho Supreme Court has stated that "motions for summary judgment should be granted with caution." *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). Pursuant to the Idaho Rules of Civil Procedure, summary judgment should only be granted when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to *any* material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c) (emphasis added).

The trial court must liberally construe all facts—and all reasonable inferences that can be drawn from those facts—in favor of the party opposing the motion. *Ray v. Nampa School Dist. No. 131*, 120 Idaho 117, 122, 814 P.2d 17, 19 (1991). If reasonable people could reach different conclusions or draw conflicting inferences from the evidence, the motion must be denied.

It is well settled in Idaho that in ruling on a motion for summary judgment, the trial court is not permitted to weigh the evidence or to resolve controverted factual issues. If the pleadings, admissions, depositions and affidavits raise any question of credibility of witnesses or weight of the evidence, the motion for summary judgment should be denied. *Altman v. Arndt*, 109 Idaho 218, 221, 706 P.2d 107, 110 (Idaho Ct. App., 1985) (citations omitted). "When ruling on a motion for summary judgment, it is not within the trial court's province to assess the credibility



of an affiant or deponent when credibility can be tested in court before a trier of fact.” *Sohn v. Foley*, 125 Idaho 168, 171, 868 P.2d 496, 499 (Idaho Ct. App., 1994).

Summary judgment may be granted in the non-movant’s favor. It is established law in Idaho that “[s]ummary judgment may be rendered for any party, not just the moving party, and on any or all of the causes of action involved, under the rules of civil procedure. Flexibility in designing summary judgment orders is clearly the intent of the drafters of the civil rules.” *Brummett v. Ediger*, 106 Idaho 724, 726, 682 P.2d 1271, 1273 (1984).

### III. DISCUSSION

#### 1. **32 U.S.C.A. § 502, the statute upon which Ms. Larson relies, does not include travel to and from National Guard training.**

Ms. Larson relies on two statutes in support of her summary judgment motion, Idaho Code § 6-904(4) and 32 U.S.C. 502. Section 6-904 states that

[a] governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

...

Arises out of the activities of the Idaho national guard [sic] *when engaged in training or duty* under sections 316, 502, 503, 504, 505 or 709, title 32, United States Code.

(Emphasis added). Section 502(a), the statute Ms. Larson relies upon, states,

(a) Under regulations to be prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, each company, battery, squadron, and detachment of the National Guard, unless excused by the Secretary concerned, shall—

(1) assemble for drill and instruction, including indoor target practice, at least 48 times each year; and

(2) participate in training at encampments, maneuvers, outdoor target practice, or other exercises, at least 15 days each year.

Ms. Larson's trip home from Lewiston to Boise was not "training or duty" as explained in 32 U.S.C. § 502.

Mr. Rice states in his affidavit that Ms. Larson was only dismissed and allowed to leave Lewiston after she had completed her drill. Affidavit of Tony Rice, ¶ 6. At the time of the accident, Ms. Larson had completed all activities listed under 32 U.S.C.A. 502(a). Ms. Larson has provided no authority in support of the position that either the Idaho legislature or the United States congress intended to exempt National Guard members from liability for accidents they may cause traveling to or from their training.

2..     **Mallory Larson was not "acting within the course and scope of [her] employment or duties" at the time of the accident.**

Idaho Code section 6-904 (4) provides that a "governmental entity and its employees while *acting within the course and scope of their employment* and without malice or criminal intent shall not be liable for any claim which ... [a]rises out of the activities of the Idaho national guard when engaged in training or duty under sections 316, 502, 503, 504, 505 or 709, title 32, United States Code." (Emphasis added). Accordingly, the applicability of these statutes turns on whether Ms. Larson was "acting within the course and scope" of her employment with the National Guard at the time of the accident.

The Idaho Supreme Court has not had an occasion to interpret or discuss the applicability of I.C. § 6-904(4). The Court's discussions regarding the meaning of the phrase "course and scope of employment" have generally arisen in two contexts: (1) employer liability under the doctrine of respondeat superior, (2) and worker's compensation cases. In defining the scope of employment in a tort case, the doctrine of *respondeat superior* is considered the appropriate standard to be applied. The concepts discussed in worker's compensation cases may be instructive, but are not controlling. The Arizona Court of Appeals discussed the relationship

between these two areas of law in *Robarge v. Bechtel Power Corp.*, 640 P.2d 211 (Ariz. Ct. App. 1982):

The line separating workmen's compensation cases from tort law cases is indistinct, for tort cases have cited workmen's compensation cases as precedential authority, in addition to using similar language when addressing situations common to both and, particularly, when the "going and coming" rule is at issue. Nevertheless, the rules adopted for workmen's compensation cases should not be mechanically applied in negligence cases.

640 P.2d at 213 (citations omitted). The *Robarge* court cited the policy reasons for this distinction as follows:

While workmen's compensation law and respondeat superior doctrine both involve allocations of costs regarding industrial accidents, they differ in scope. Workmen's compensation benefits turn solely upon whether the employee was injured while performing an activity related to his job-and "relatedness" is usually a function of benefit to the employer. In contrast, respondeat superior subjects employers to liability for injuries suffered by an indefinite number of third persons. To limit this burden of liability, the narrower concept, "scope of employment," has long been tied to the employer's right to control the employee's activity at the time of his tortious conduct.

640 P.2d at 213, *quoting Luth v. Rogers and Babler Constr. Co.*, 507 P.2d 761, 764 (Alaska 1973).

The doctrine of *respondeat superior* provides that an employer is responsible for the torts of its employee when the torts are committed within the scope of employment. *Rausch v. Pocatello Lumber Co., Inc.*, 135 Idaho 80, 83-84, 14 P.3d 1074, 1077-78 (Ct. App. 2000), *quoting Podolan v. Idaho Legal Aid Services, Inc.*, 123 Idaho 937,944, 854 P.2d 280,287 (Ct. App. 1993). In general, the employee's conduct "is within the scope of his employment if it is of the kind which he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part, by a purpose to serve the master." *Podolan*, 123 Idaho at 944, 854 P.2d at 287 (citations omitted).

In Idaho, the test for whether an employee was acting within the scope of his employment when he committed a tort is "the right to control reserved by the employer over the functions and duties of the agent." *Id.* at 945, 854 P.2d at 288 (citations omitted). Generally, the issue "is a factual question to be decided by the trier of fact. However, conduct that is clearly outside the scope of employment may properly be decided by the court as a matter of law." *Id.*, citing *Birkner v. Salt Lake County*, 771 P.2d 1053, 1057 (Utah 1989) and *Manion v. Waybright*, 59 Idaho 643, 656, 86 P.2d 181, 186 (1938).

This doctrine was recently discussed by the Idaho Supreme Court in *Finholt v. Cresto*, 143 Idaho 894, 155 P.3d 695 (2007). In *Finholt*, the plaintiff was injured in an automobile accident involving Jacob Albrethsen, who worked as a salesman for Fairway Lawns, a company owned by the defendant. Albrethsen worked a split-shift of mornings and early evenings, and Fairway required that Albrethsen provide his own vehicle, although the company reimbursed him for the cost of traveling to job sites. *Id.* at 896, 155 P.3d 697. At the time of the accident, Albrethsen had completed his morning assignments and was on his way to meet his girlfriend for lunch. *Id.*

The defendant moved for summary judgment, asserting that Albrethsen was not acting within the course and scope of his employment at the time of the accident. The plaintiff argued that Albrethsen's actions fell under a "special errand" or "traveling employee" exception. *Id.* 143 Idaho at 897, 155 P.3d at 698. The court noted that generally, "work performed to serve the employer falls within the course and scope of employment, whereas actions pursued for a purely personal purpose do not." *Id.*, citing *Wooley Trust v. DeBest Plumbing, Inc.*, 133 Idaho 180, 184, 983 P.2d 834, 838 (1999).

Pursuant to the "coming and going" rule articulated by Idaho courts, an employee is not acting within the course and scope of his employment while he is on his way to and from work.<sup>1</sup> 143 Idaho at 898, 155 P.3d at 699, *citing Ridgway v. Combined Ins. Companies of America*, 98 Idaho 410, 411, 565 P.2d 1367, 1368 (1977). The "special errand" exception to this rule, which typically arises in worker's compensation cases, provides that an employee who leaves his normal place of work to perform some special service or errand at the direction of his employer is considered to be acting within the course and scope of his employment. 143 Idaho at 898, 155 P.3d at 699 (citations omitted).<sup>2</sup> The *Finholt* court concluded that the special errand exception did not apply to the facts of the case.

Next, the court discussed the "traveling employee" exception to the coming and going rule, in which an employee is typically covered by worker's compensation when the "employee's work requires him to travel away from the employer's place of business or his normal place of work." 143 Idaho at 898, 155 P.3d at 699, *quoting Cheung v. Wasatch Electric*, 136 Idaho 895, 897, 42 P.3d 688, 690 (2002). Noting that the traveling employee theory had not previously been applied "outside the worker's compensation context where it expands employer liability," the Court stated, "Regardless, we need not reach the question of whether to apply the traveling employee exception to tort claims, because the theory would not apply to the facts presented by this case." 143 Idaho at 898, 155 P.3d at 699.

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<sup>1</sup> The Idaho Court of Appeals has stated that the "coming and going" rule from worker's compensation law may be applied in negligence actions brought against employers based on the theory of respondeat superior. *Casey v. Sevy*, 129 Idaho, 13, 17, 921 P.2d 190, 194 (Ct. App. 1996).

<sup>2</sup> A form of this exception was considered by the Idaho Court of Appeals in *Casey v. Sevy*, although it was not specifically designed as such. In *Casey*, the plaintiffs asserted that the incident fell under an exception to the coming and going rule, because the employee was traveling from his employer's premises "for a specified task as directed by his employer." 129 Idaho at 18, 921 P.2d at 195. Without discussing whether the exception *should* be applied in tort cases, the court stated that it was ultimately unpersuaded by the plaintiffs' theories regarding why the coming and going rule was inapplicable to the case. *Id.* At 19, 921 P.2d at 196.

Even if this Court were to apply worker's compensation theories into consideration, for the following reasons, the Defendant has failed to establish that she was acting within the course and scope of her employment with the National Guard at the time of the accident. First, Ms. Larson acknowledges that at the time of the accident, she had already been released from her training duties. On the weekend of the accident, Ms. Larson had been "participating in her monthly training commitment to the Idaho National Guard" in Lewiston, Idaho. However, at "approximately 12:00 noon on January 7, 2007, the guard members were released from training due to a snow storm forecast." Affidavit of Ned Cannon, Ex. A, "Defendant's Answer to Plaintiff's Interrog. No.8 (emphasis added). Ms. Larson's destination at the time of the accident was her home in Nampa, Idaho. Defendant's Answer to Plaintiff's Interrog. No. 10. She was driving her own vehicle, which was registered to her grandparents, Clifford and Darlene Kleer. Defendant's Answers to Plaintiff's Interrogs. and Reqs. for Production, Exhibit F, Tr. of Recorded Statement of Mallory Larson at page 3.

It is clear that at the time of the accident, Ms. Larson had completed her work duties and was simply returning home. Under the "coming and going" rule, Ms. Larson was not acting within the course and scope of her employment while she was on her way home from work.

Neither does the "traveling employee" exception apply. Again, this exception has been previously limited to worker's compensation cases. The Idaho Supreme Court clarified the "traveling employee" exception in *Andrews v. Les Bois Masonry, Inc.*, 127 Idaho 65, 896, P.2d 973 (1995), a worker's compensation case, as follows: "When an employee's work requires the employee to travel away from the employer's place of business or the employee's normal place of work, the employee will be held to be within the course and scope of employment continuously

during the trip, except when a distinct departure for personal business occurs." *Id.* at 67, 896 P.2d at 975.

In this case, Ms. Larson was not traveling away from her normal place of work to engage in more work for the National Guard at a different job site, nor was she transferring from one training station to another. She had concluded her work and was simply returning home; therefore, the traveling employee exception should not apply.<sup>3</sup>

Further, although the traveling employee doctrine does not require that the employee receive travel expenses, "the payment of travel expenses, along with other evidence indicating the employer intended to compensate the employee for travel time, will justify expanding the course of employment to include going to and from work." *Barker v. Fischbach & Moore, Inc.*, 110 Idaho 871, 872, 719 P.2d 1131, 1132 (1986), *quoting Barker v. Fischbach & Moore, Inc.*, 105 Idaho 108, 666 P.2d 635 (1983) (Barker I); *Andrews*, 127 Idaho at 67, 896, P.2d at 975. Ms. Larson acknowledges that the National Guard does not reimburse her for travel expenses associated with attending weekend trainings:

- Q. All right, now when you're on guard duty uh, traveling back and forth, is, are the travel expenses paid by the National Guard or are they paid out of your own pocket?
- A. They're paid out of my own pocket.
- Q. Are you reimbursed by the Guard?
- A. No.

Aff. of Ned Cannon, Tr. of Recorded Statement of Mallory Larson at p.2. Again, while the travel expenses issue is not decisive, the fact that Ms. Larson's expenses were not paid by the National

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<sup>3</sup> Ms. Larson has stated that the National Guard provides medical coverage for her while she is traveling to and from guard duty. (Tr. of Recorded Statement of Mallory Larson at 10-11.) This fact may be used to bolster an argument for application of the traveling employee exception, but, as discussed below, the basic test regarding the doctrine of respondeat superior is whether the employer had a right to control the employee's conduct. Although the National Guard may have provided medical coverage while Ms. Larson was traveling, it did not have any control over her manner of travel.



Guard is strongly suggestive that Ms. Larson's travel was not within the course of her employment with the National Guard.

Neither does the "special errand" exception apply in this case because Ms. Larson was providing transportation for another employee, Danielle Poe:

- Q. Okay, let's see now uh, when you and her were getting ready to go to do Guard duty uh, did she, does she ask you if she can ride with you or do you a ... just volunteer to take her or how do you make that arrangement?
- A. Uh, it was, okay at that time I had been asked by my commander and my uh, section sargent [sic] to provide transportation for her.
- Q. Okay.
- A. And then it just kind a ended up that we would prearrange our you know, when we t. .. when I'd pick her up and where I'd drop her off and all that so . . .
- A. So they requested that you give her transportation on this particular uh . . .
- A. Yes.
- Q. Okay, now have they requested that before?
- A. Uh, yes.

Aff. of Ned Cannon, Tr. of Recorded Statement of Mallory Larson at p. 14. Ms. Larson argues that providing transportation for Ms. Poe for the weekend was part of Ms. Larson's job. However, it should be remembered that Ms. Larson was expected to travel to Boise for training anyway, and that she was not being reimbursed for her travel expenses. Also, it seems that Ms. Larson was not being reimbursed for travel expenses associated with providing a ride for Ms. Poe, as the two shared fuel expenses during the trip. *See* Tr. of Recorded Statement of Mallory Larson at 14. While Ms. Larson may have been asked to give Ms. Poe a ride for the sake of convenience, it does not appear that providing transportation was considered a part of Ms. Larson's job duties for the National Guard, either generally or on this occasion specifically. Apparently Ms. Poe was also required to travel to Lewiston for weekend training at her own expense, and Ms. Larson merely facilitated this trip. Both Ms. Larson and Ms. Poe benefited from this arrangement, as each spent less for fuel than if they had traveled separately. The fact that Ms. Larson provided a ride for Ms. Poe does not mean that Ms. Larson's act of returning

home to Nampa after being released from training duty in Lewiston amounted to a special errand for her employer.

Courts in other jurisdictions have reached similar conclusions in cases involving automobile accidents in which national guardsmen were traveling in their own vehicles. In *State v. Superior Court*, 524 P.2d 951 (Ariz. 1974), the Arizona Supreme Court considered whether the state of Arizona could be held liable under the doctrine of *respondeat superior* for the negligent acts of an Arizona National Guardsman who was involved in an automobile accident while traveling to a weekend training session. The guardsman, who was driving his own vehicle, was killed in the accident, as were the occupants of the other vehicle. In determining whether the guardsman was acting in the scope of his employment at the time of the accident, the court concluded that no exception to the "going and coming" rule applied under the facts of the case:

Going to work is certainly preparatory to working. But, such travel is not within the scope of the employment unless the employee is rendering a service growing out of or incidental to the employment. Driving his car to Phoenix was not part of Derrick's training. He was not required to run any errands for the Academy before his 6:30 a.m. arrival. While the Arizona National Guard granted travel reimbursements, we can find no authority that would give the Guard a legal right to control Derrick before the time that he was ordered to report for duty, such as during his travel from San Manuel to Phoenix or travel back home, again.

524 P .2d at 954. The court also noted that whereas employer liability under the doctrine of *repondeat superior* generally depends upon the employer's right to control the employee's conduct, such control was lacking in this case: "The Guard had no right to dictate the manner of travel, the route to be taken, his speed, or that he use his car to go and come from school as compared to other modes of travel." *Id.* Further, the payment of a travel allowance, without more, did not subject the guardsman to the control of the Guard while he was traveling. Finally, although the respondents argued that the guardsman was on "'full time training duty' throughout the six-months period of attendance at the monthly school meetings in Phoenix," the court found

that the record did not support this contention. The guardsman had a full-time civilian job, and his orders only required him to report for full-time training duty for a period of two days each month: "Derrick's once-a-month sessions at the Arizona Academy certainly did not give him 'full time' status in the Arizona National Guard for six months while at the same time he worked six days a week for Magma Copper Company." *Id.* at 955.

The facts of the present case are similar to those in *State v. Superior Court*. Ms. Larson was driving her own vehicle home after completing her monthly training duty. The Guard had no right to dictate Ms. Larson's manner of travel, the route to be taken, her speed, or her mode of transportation. Ms. Larson was not even reimbursed for travel expenses, unlike the guardsman in *State v. Superior Court*. Finally, her monthly training duties did not give her full-time status, especially since she maintained a civilian job as a food service worker for the Idaho Department of Corrections. Aff. of Ned Cannon, Tr. of Recorded Statement of Mallory Larson at 1. As in *State v. Superior Court*, the employer control necessary for liability under the doctrine of *respondeat superior* is lacking here. *See also Robarge*, 640 P.2d at 214 (employee driving home at end of workday was not within the scope of employment because he was traveling in his own vehicle and without employer imposed obligations regarding route, manner of travel, or work-related duties).

The Ninth Circuit Court of Appeals considered a similar factual situation in *Hartzell v. United States*, 786 F.2d 964 (9th Cir. 1986), in which the United States was held not liable for injuries resulting from an automobile accident involving an Air Force staff sergeant. At the time of the accident, the staff sergeant had just completed a temporary duty assignment at Camp Mercury in Nevada and was driving her own vehicle back to her permanent duty station at

Kirtland Air Force Base, near Albuquerque, New Mexico. She had also requested one additional day of leave so that she could do some sight-seeing on her way back to Kirtland.

Applying Arizona law, the court stated that

an employee is considered to be acting within the scope of employment if he meets either of two related tests. The first, adopted from section 228 of the Restatement (Second) of Agency, states that the act of an employee is within the scope of employment only if: (1) it is typical of the kind of work the employee was hired to perform; (2) it occurs within the authorized time and space limits; and (3) it was intended at least in part to serve the master. The second holds an employer liable for the negligence of an employee if, at the time of the accident, the employee is: (1) subject to the employer's control or right to control; and (2) acting in furtherance of the employer's business.

786 F.2d at 966 (citations omitted). The Court found that neither of these tests was satisfied under the factual circumstances of the case. As to the first test, the staff sergeant was an administrative specialist; driving her own vehicle for personal reasons was not an act typical of the work she was hired to perform. Also, because the accident occurred while she was on leave, it did not occur within the authorized time and space of her employment. Further, although the staff sergeant's travel from a temporary duty station back to her permanent duty station "was in some part intended to serve the Air Force, this factor alone is not sufficient to bring her within the scope of employment." *Id.* at 966-67. As to the control test, the Court noted that the Air Force did not have the right to control the staff sergeant's route and manner of travel, nor did it request that she perform any service related duties en route back to her base. *Id.* at 967. Additionally, the staff sergeant was on leave at the time of the accident; the Air Force's only interest in her during this period was that she report back to Kirtland on time. *Id.* See also *Wuorinen v. State Farm Mutual Auto Ins. Co.*, 201 N.W.2d 521 (Wis. 1972) (state was not liable for injuries caused by national guardsman's negligent operation of his vehicle where guardsman was on 24-hour leave and the National Guard did not control his conduct at the time of the accident or the method or route of travel in his private vehicle).

In the present case, if this Court applied the test set forth in *Hartzell*, the result would be the same. As to the first test, driving her own vehicle was not typical of the kind of work Ms. Larson was hired to perform for the National Guard. Also, because Ms. Larson had completed her training duties for the weekend and was released to return home, the accident did not occur within the authorized time and space limits of her employment. Further, although it could be argued that providing transportation for Ms. Poe was intended at least in part to serve Ms. Larson's employer, this factor alone is not sufficient to bring Ms. Larson within the scope of employment. In *Hartzell*, the fact that the staff sergeant was traveling from one duty station to another was not sufficient. In this case, Ms. Larson was not even traveling from one duty assignment to another, or from one job site to another. She had been released from work and was simply returning home.

As to the second test, the National Guard had no right to control Ms. Larson's actions after she was released from training duty. It has been noted that "the right to control has long been the touchstone in determining whether one was acting within the scope of his employment." *Wuorinen*, 201 N.W.2d at 526. In *Wuorinen v. State Farm Mutual Auto Ins. Co.*, another case involving an off-duty national guardsman who had an accident while driving his own vehicle, the Wisconsin Supreme Court observed that

the "right of control" is material to determine whether Semenok was acting within the scope of his employment. We believe the answer is clear. One authorized to leave on pass to do what he wants on his own free time for a period of 24 hours is not acting within the scope of his military duty nor in pursuance thereof. The national guard was in no way controlling Semenok's free time, and the national guard did not control Semenok's conduct at these material times, nor the method or route of travel in his private vehicle.

*Id.* Similarly, the National Guard did not control Ms. Larson's conduct at the time of the accident. She was free to take any route on her return trip home. She could sight-see if she wanted to, could stop for meals or to rest; she could make the trip in one day, or take several

days to return home if she chose. This complete freedom of action further emphasizes the conclusion that Ms. Larson was not acting within the course and scope of her employment at the time of the accident.

It should be noted that the plaintiffs in *Hartzell* also argued for application of the "dual purpose" rule, which provides that "an employee is acting within the scope of his employment if he is going to or coming from the job site and service to the employer is at least a concurrent cause of his trip." 786 F.2d at 970 (citations omitted). However, the Court noted that the dual purpose rule is a worker's compensation concept that had only been applied to the *respondeat superior* setting once by an Arizona court, and that Arizona courts since then had refused to extend the rule beyond the facts of that case. The court reiterated that in Arizona, the *doctrine of respondeat superior* is the standard against which a determination of scope of employment should be made in a tort case, and that concepts borrowed from worker's compensation law are not controlling in tort cases. *Id.* (citations omitted). *See also Wuorinen*, 201 N.W.2d 521 ("This is not a workmen's compensation case so neither the broader test of employment nor the dual purpose doctrine are controlling. Rather, the principles of the common-law doctrine of respondeat superior apply.").

In this case, Ms. Larson has failed to establish that her return trip from training in Lewiston to her home was within the scope of her employment for purposes of Idaho Code § 6-904(4).

#### IV. CONCLUSION

For the reasons stated above, summary judgment is inappropriate. Ms. Larson is not entitled to judgment as a matter of law pursuant to Idaho Code § 904(4).

Moreover, interpretation of Idaho Code § 904(4) is a matter of first impression in the state of Idaho. Should it be necessary for the issue to go up to the Idaho Supreme Court on appeal, as a matter of judicial efficiency it would be better to do so with a complete record after a full and fair presentation of the evidence.

DATED this 29<sup>th</sup> day of May, 2012.

  
Ned A. Cannon

**CERTIFICATE OF SERVICE**

I, Ned A. Cannon, declare that, on the date indicated below, I served a true and correct copy of this *Memorandum in Opposition to Summary Judgment* on Mallory Larson through her counsel via the method(s) indicated below:

Sonyalee Nutsch  
Clements Brown & McNichols  
321 13th Street  
Lewiston, ID 83501

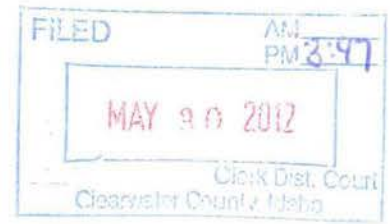
**Via:**

- ☐ U.S. Mail, Postage Prepaid
- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile

Signed this 29<sup>th</sup> day of May 2012, at Lewiston, Idaho.

  
Ned A. Cannon





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Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendant.

Case No.: CV 09-420

**MOTION TO STRIKE**

Plaintiff moves to strike the following Paragraphs from the affidavit submitted by SSG Tony Rice: ¶¶ 5, 7, and Exhibit A. Plaintiff also moves to strike the following Paragraphs from the affidavit submitted by Mallory E. Martinez: ¶¶ 6, 7, and Exhibit A.

This Motion is made pursuant to Idaho Rule of Civil Procedure 56(e), and is based upon the records and files herein and the accompanying Memorandum in Support.

Should the Court deny Plaintiff's Motion to Strike, Plaintiff moves the Court to deny Ms. Larson's motion for summary judgment pursuant to Rule 56(f). If the Exhibits are deemed

admissible by the Court, Plaintiff seeks additional time to depose both affiants and the author of the Report that is attached as Exhibit A to the affidavits of Mr. Rice and Ms. Larson.

DATED this 29<sup>th</sup> day of May, 2012.

  
Ned A. Cannon

**CERTIFICATE OF SERVICE**

I, Ned A. Cannon, declare that, on the date indicated below, I served a true and correct copy of this *Motion to Strike* on Mallory Larson through her counsel via the method(s) indicated below:

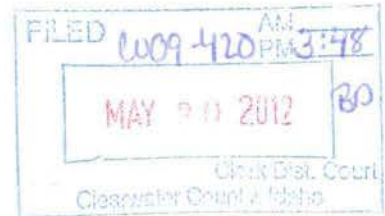
Sonyalee Nutsch  
Clements Brown & McNichols  
321 13th Street  
Lewiston, ID 83501

**Via:**

- ☐ U.S. Mail, Postage Prepaid
- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile

Signed this 29<sup>th</sup> day of May 2012, at Lewiston, Idaho.

  
Ned A. Cannon



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Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendant.

Case No.: CV 09-420

**MEMORANDUM IN SUPPORT OF  
MOTION TO STRIKE**

**I. LEGAL ARGUMENT**

**1. Portions of the Affidavit of SSG Tony Rice and the Affidavit of  
Mallory Larson should be stricken as inadmissible.**

Idaho Rule of Civil Procedure 56(e) states in pertinent part, "Supporting and opposing affidavits shall ... set forth facts as would be admissible in evidence." The Idaho Supreme Court has stated,

The admissibility of evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial.

*J-U-B Engineers, Inc. v. Security Ins. Co. of Hartford*, 146 Idaho 311, 314-15, 193 P.3d 858, 861-62 (2008) (citations omitted).

In this case, the Affidavit of Tony Rice and the Affidavit of Mallory Larson should be stricken for the following reasons: (1) Both affidavits contain inadmissible hearsay; and (2) both affidavits were submitted for the primary purpose of admitting the legal conclusions contained therein.

**a. The Affidavit of SSG Tony Rice and Mallory Larson contain inadmissible hearsay.**

The Idaho Rules of Evidence Rule 801(c) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 802 states that “[h]earsay is not admissible except as provided by these rules or other rules promulgated by the Supreme Court of Idaho.”

In this case, the Affidavit of Tony Rice and the Affidavit of Mallory Larson both contain inadmissible hearsay. Both affidavits contain an Exhibit A, “Report of Investigation.” Neither Mr. Rice nor Ms. Larson indicates who produced the report, but both heavily rely on the report in support of the position that Ms. Larson was on duty at the time of the accident.

Plaintiff respectfully petitions the Court to strike Exhibit A and all conclusions drawn by Ms. Larson and Mr. Rice based on the Report. The document is a statement made by one other than either Mr. Rice or Ms. Larson; the document is submitted in support of summary judgment; the Report is submitted to attempt to prove the truth of the matter asserted—that Ms. Larson was on duty at the time of the accident.

Ms. Larson has failed to state whether the declarant is available, and if the document’s author is available, why the declarant has failed to submit his or her own affidavit. Plaintiff has not had an opportunity to question the document’s author, and the Court has no guarantees as to

the document's trustworthiness. Accordingly, the "Report of Investigation" is inadmissible hearsay.

**b. The Affidavit of SSG Tony Rice and the Affidavit of Mallory Larson contain inadmissible legal conclusions.**

The Eleventh Circuit Court of Appeals stated, "Legal conclusions are inadmissible because the jury would have no way of knowing whether the preparer of the report was cognizant of the requirements underlying the legal conclusion and, if not, whether the preparer might have a higher or lower standard than the law requires." *Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299, 303 (11th Cir., 1989). The Ninth Circuit has analyzed the *Hines* decision and has reached a similar conclusion.

Pure legal conclusions are not admissible as factual findings. In the context of a summary judgment motion, a conclusion of law by a third-party investigator does not, by itself, create a genuine issue of material fact for the obvious reason that a legal conclusion is not a factual statement and for the reasons explained by the Eleventh Circuit.

*Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 777 (C.A.9, 2010).

Larson Affidavit Paragraphs 6 and 7 state in pertinent part as follows:

At the time of the accident on January 7, 2007, I was on duty with the Idaho National Guard and was acting under my superior's orders by transporting a fellow guardsman to Boise, Idaho.

After the accident, I reported it to SSG Rices and an investigation was completed to determine if I was on duty. I cooperated in that investigation and received a copy of the report once it was completed.

Whether Ms. Larson was "on duty" for purposes of Idaho Code § 6-904 is a matter of law. The Idaho Supreme Court has not ruled on the issue. It is impermissible for Ms. Larson offer a legal opinion on the issue in her affidavit.

Mr. Rice draws similar conclusions to Ms. Larson. His affidavit at Paragraphs 5 and 7 state in pertinent part,

SPC Larson was on duty from 12:00 a.m. on January 6, 2007 to 11:59 p.m. on January 7, 2007.

SPC Larson notified me of the accident after it occurred. A line of Duty Report of Investigation was completed. The result of the investigation determined that SPC Larson was on duty at the time of the accident and her medical bills were paid as a result of that determination.

Again, whether Ms. Larson was “on duty” for purposes of Idaho Code § 6-904 is a matter of law.

Mr. Rice has failed to provide any foundation to support his legal conclusions.

**2. If Exhibit A of the affidavits of Mr. Rice and Ms. Larson are deemed admissible, Plaintiff petitions the Court to deny summary judgment pursuant to Rule 56(f).**

Idaho Rule of Civil Procedure 56(f) provides,

Should it appear from the affidavits of a party opposing the motion that the party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party’s opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

In this case, Defendant has submitted a report attached to two separate affidavits without disclosing the report’s author. If the Court deems the report admissible, Plaintiff petitions the Court to deny summary judgment at this time in order that Plaintiff may seek further discovery and depose affiants and the report’s author.

**II. CONCLUSION**

For the reasons stated above, Plaintiff respectfully moves the Court to strike Exhibit A from both the Affidavit of Tony Rice and the Affidavit of Mallory Larson. The Exhibit is inadmissible hearsay, and neither affidavit provides the name of the document’s author. Plaintiff also petitions the Court to strike all legal conclusions in Ms. Larson’s and Mr. Rice’s affidavits



as to the issue of whether Ms. Larson was “on duty” at the time of the accident for purposes of Idaho Code § 6-904.

In the alternative, Plaintiff petitions the Court to deny summary judgment at this time pursuant to Rule 56(f) in order that Plaintiff may conduct further discovery.

DATED this 29<sup>th</sup> day of May, 2012.

  
Ned A. Cannon

**CERTIFICATE OF SERVICE**

I, Ned A. Cannon, declare that, on the date indicated below, I served a true and correct copy of this *Memorandum in Support of Motion to Strike* on Mallory Larson through her counsel via the method(s) indicated below:

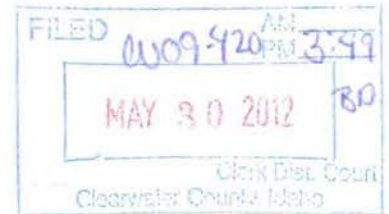
Sonyalee Nutsch  
Clements Brown & McNichols  
321 13th Street  
Lewiston, ID 83501

**Via:**

- ☐ U.S. Mail, Postage Prepaid
- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile

Signed this 29<sup>th</sup> day of May 2012, at Lewiston, Idaho.

  
Ned A. Cannon



NED A. CANNON, ISB No. 2331  
SMITH & CANNON PLLC  
508 Eighth Street  
Lewiston, Idaho 83501  
Telephone: (208) 743-9428  
Fax: (208) 746-8421

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendants.

Case No.: CV 09-00420

**AFFIDAVIT OF NED A. CANNON**

STATE OF IDAHO           )  
                                      ) ss:  
COUNTY OF NEZ PERCE   )

I, Ned A. Cannon, being first duly sworn on oath, deposes and says:

I am over the age of eighteen years, competent to testify in court, and make this  
Affidavit based upon my personal knowledge.

I am the attorney for Plaintiff in the above-entitled matter.

Attached hereto as Exhibit A are true and correct copies of excerpts from  
*Defendant's Answers to Plaintiff's Interrogatories and Requests for Production* dated

November 3, 2009, including *Answer No. 8*, *Answer No. 10*, and portions of Exhibit F.

DATED: This 29<sup>th</sup> day of May, 2012.

  
Ned A. Cannon

SUBSCRIBED AND SWORN to before me this 29<sup>th</sup> day of May, 2012.

\_\_\_\_\_  
Notary Public for Idaho  
Residing at Lewiston.  
My commission expires: June 11, 2014

**CERTIFICATE OF SERVICE**

I, Ned A. Cannon, declare that, on the date indicated below, I served a true and correct copy of this *Affidavit of Ned A. Cannon* on Defendant through her counsel via the method indicated below:

Sonyalee Nutsch  
Clements Brown & McNichols  
321 13th Street  
Lewiston, ID 83501

**Via:**

- ☐ U.S. Mail, Postage Prepaid
- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Email (pdf attachment)

Signed this 29<sup>th</sup> day of May, 2012, at Lewiston, Idaho.

  
Ned A. Cannon

# Exhibit A

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

WILLIAM P. TEURLINGS,	)	
	)	Case No: CV09-00025
	)	
Plaintiff,	)	DEFENDANT'S ANSWERS TO
	)	PLAINTIFF'S INTERROGATORIES
vs.	)	AND REQUESTS FOR PRODUCTION
	)	
MALLORY E. LARSON,	)	
	)	
Defendants	)	
_____	)	

Defendant, through her attorney, Sonyalee R. Nutsch responds to Plaintiff's  
Interrogatories and Requests for Production as follows:

**INTERROGATORIES**

INTERROGATORY NO. 1: Please identify yourself and identify each and every  
person with whom you consulted, upon whom you relied, or who otherwise constituted a  
source of information for you in connection with the preparation of your answers to these  
interrogatories, listing with respect to each and every such person the number of each  
interrogatory and/or discovery request to which he or she helped you to prepare answers

DEFENDANT'S ANSWERS TO  
PLAINTIFF'S INTERROGATORIES  
AND REQUESTS FOR PRODUCTION -1-

INTERROGATORY NO. 8: Please fully describe Defendant driver's activities for the twenty-four (24) hours immediately preceding the collision set forth in the Plaintiff's Complaint.

ANSWER: Defendant objects to Interrogatory No. 8 on the grounds that the interrogatory is overly broad and seeks information that is not reasonably calculated to lead to the discovery of admissible evidence. Reserving these objections, to the best of her recollection, Mallory Larson recalls that she was participating in her monthly training commitment to the Idaho National Guard on the weekend of the accident. Mallory Larson would have participated in training in Lewiston, Idaho, on January 7, 2007. On a typical training weekend, Mallory Larson would have driven to Orofino, Idaho, after guard training on Saturday, January 6, 2007, and spent the night with either her mom, Cristine Erbst, or her grandparents Clifford and Darlene Kleer. She would have gone to bed at approximately 9:00 p.m. and gotten up around 6:00 a.m. on January 7, 2007. She would have left Orofino in time to arrive in Lewiston at 8:00 a.m. for additional guard training. At approximately 12:00 noon on January 7, 2007, the guard members were released from training due to a snow storm forecast. Mallory Larson and Danielle Poe may have stopped for something to eat after finishing training and after eating would have started their trip to return to Nampa, Idaho.



INTERROGATORY NO. 10: Please set forth the names, addresses and telephone numbers of all persons with whom Defendant driver had contact within the eight (8) hours immediately prior to the collision set forth in Plaintiff's Complaint. Please specifically describe her activities for such eight (8) hour period, along with her reasons for being in contact with each named person. Please identify the name, address, and phone number of Defendant's planned destination at the time of collision herein.

ANSWER: Defendant objects to Interrogatory No. 10 on the grounds that the Interrogatory is overly broad, unduly burdensome, compound and seeks information that is not reasonably calculated to lead to the discovery of admissible evidence. Reserving these objections, Mallory Larson would have gotten up on the morning of January 7, 2007, at approximately 6:00 a.m. and would have left from either her mom's or grandparents' home in Orofino, Idaho, in sufficient time to arrive at the Idaho National Guard Headquarters located at 2707 16th Avenue, Lewiston, Idaho, for training by 8:00 a.m. Mallory Larson does not recall all of the names of the guard members who attended

training that weekend. Mallory Larson would have had communications with her commander, Cpt. Deverteuil, her first sergeant, First Sergeant Frost and, her section sergeant, Staff Sergeant Tony Rice. Mallory Larson would have also had communication with Danielle Poe, a fellow guard person. Mallory Larson's destination at the time of the accident was her home which at that time was located at 11692 West Trinity Avenue, Nampa, Idaho 83651.

INTERROGATORY NO. 21: In Defendant's answer, she provides affirmative defenses Nos. 1-7. As to each affirmative defense Nos. 1-6, please identify each fact upon which such affirmative defense is based, and the name, address, and phone number of each witness who has or may have any information pertaining to each such fact.

ANSWER: Defendant objects to Interrogatory No. 21 on the grounds that it seeks information that is privileged as attorney work product and on the grounds that it calls for the disclosure of the mental impressions, conclusions, opinions or legal theories of defense counsel. Reserving these objections, discovery is in its earliest stages and factual investigation is not complete.

REQUEST FOR PRODUCTION NO. 5 Please produce every document, note, memorandum, or other written material, of any kind, which in any way references and/or pertains to your answer to Interrogatory No. 21.

RESPONSE: See Objection and Answer to Interrogatory No. 21.

INTERROGATORY NO. 22: Do you agree to supplement your responses to these interrogatories in accordance with Rule 26(e)(3) of the *Idaho Rules of Civil Procedure*, without new requests for supplementation of prior responses?

ANSWER: Defendant agrees to supplement her responses in accordance with I.R.C.P. 26(e)(1) and (2) only.

DATED this 3rd day of November 2009.


  
MALLORY LARSON

**VERIFICATION**

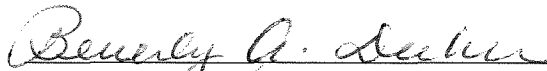
STATE OF IDAHO                     )  
  ) ss:  
County of Nez Perce             )

Mallory Larson, being first duly sworn on oath, deposes and says:

That she is the Defendant in the above-entitled matter; that she has read the foregoing DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION and well knows the contents thereof; that the facts therein stated are true as she verily believes.

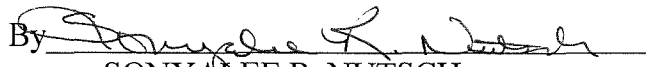
  
\_\_\_\_\_  
MALLORY LARSON

SUBSCRIBED AND SWORN to before me this 3rd day of November, 2009.

  
\_\_\_\_\_  
Notary Public in and for the State of Idaho.  
Residing at Lewiston, Idaho, therein.  
My Commission Expires: 6/24/10

As to Objections:

CLEMENTS, BROWN & McNICHOLS, P.A.

By   
\_\_\_\_\_  
SONYADEE R. NUTSCH  
Attorneys for Defendant

# Exhibit F

Insured: Clifford Kleer  
Policy No. 01-024225-01  
Date of Loss: 1-7-07

This is Steve Schlottman conducting a recorded personal uh, statement with Mallory Larson. This interview is taking place on July 6, 2007. It's approximately 12:20 p.m. Lewiston time. This interview is taken place from Lewiston, Idaho by telephone. This interview concerns an automobile accident that occurred on January 7, 2007 uh, on Highway 95.

Q. Mallory, would you give me your full name please?

A. Uh, my full name is Mallory Elizabeth Larson.

Q. Would you spell your last name for me please?

A. L-A-R-S-O-N.

Q. Are you aware that this interview is taking place?

A. Yes.

Q. And you consent to it being recorded?

A. Yes.

Q. And what is your current address and phone number?

A. 1...11692 West Trinity Avenue, in Nampa, Idaho 83651. Current phone number is 208-703-4626.

Q. Kay I'm just gonna shut off the tape for a minute and reverse and make sure I'm picking you up okay.

A. Okay.

Q. (tape stopped) Okay and what is your date of birth?

A. Um, [REDACTED] That's August 16, sorry.

Q. Kay, that's fine and are you married, single or d...were you married, single or divorced at the time of the accident?

A. Single.

Q. And at the time of the accident, what was your occupation or business?

A. Um, I'm a food service officer but at that very time I was actually getting off National Guard drill.

Q. Kay now you say food officer, food service officer.

A. Yes.

Q. And who is that, who is your employer?

A. Uh, Idaho Department of Corrections.

Q. Okay, Idaho Correction and that's out of Boise there or Nampa?

A. It's out of Kuna.

- Q. Oh okay, and at the time of the accident you were on guard duty you said?
- A. Yes.
- Q. Kay I'm just gonna ask you a couple of questions about that while we're here. Um, were you returning home from Guard duty or returning to your uh, to the Guard...
- A. Returning home.
- Q. Returning home and how long had you been on Guard duty?
- A. Uh, it had been that weekend since Friday night.
- Q. And where was the Guard duty location?
- A. It was in Lewiston.
- Q. Lewiston. So it's Friday, from Friday to Sunday basically?
- A. Yes.
- Q. All right, now when you're on guard duty uh, traveling back and forth, is, are the travel expenses paid by the National Guard or are they paid out of your own pocket?
- A. They're paid out of my own pocket.
- Q. Are you reimbursed by the Guard?
- A. No.
- Q. Kay, now when you're on Guard Duty, are you paid wages while you're traveling to and from?
- A. Um...
- Q. Or are you just paid a flat fee for the weekend or how are you paid?
- A. I'm paid a flat fee for the weekend.
- Q. Okay.
- A. How it works.
- Q. So out of that you have to, your salary and your travel expenses and all that?
- A. Yes.
- Q. Now are you paid before you go to Guard duty or after you return?
- A. After I return.
- Q. Kay, and was that your, and the vehicle that you were, well let me get back to here, um, at the time of the accident, I'm gonna go back to the general statements outlined here again. At the time of the accident, what would you consider, consider your health to be like, excellent, poor, fair, good?
- A. Excellent.
- Q. Excellent. At the time of the accident, were you on any types of medication, drugs or intoxicants?



A. No.

Q. And could you give me a description of the vehicle that you were in at the time of the accident?

A. I was in a 2002 dark red Ford Focus.

Q. Kay Ford Foc...a Ford what?

A. A Ford Focus.

Q. Okay.

A. Four door.

Q. Four door?

A. Yeah.

Q. Were you the driver at the time of the accident?

A. Yes.

Q. Uh, could you give me a description of the other vehicles that were involved in the accident?

A. I know that it was a green Buick and a uh, Volvo Swift tractor trailer.

Q. Kay.

A. And that's...

Q. Do you recall the names of the drivers of either one of those vehicles?

A. No I don't.

Q. All right, and the vehicle that you were driving, are you the registered owner on that vehicle?

A. I wasn't at the time, no.

Q. Okay who were the registered, or who was the registered owner?

A. My grandparents, Cliff and Darlene Kleer.

Q. Kay, and you had permission to drive the vehicle?

A. Yes, technically it was mine.

Q. Okay, uh, when you say technically were you making the payments on it and stuff like that?

A. Uh, no it's a complicated matter. No I wasn't but it was a gift if you could.

Q. A gift from them?

A. Yes.

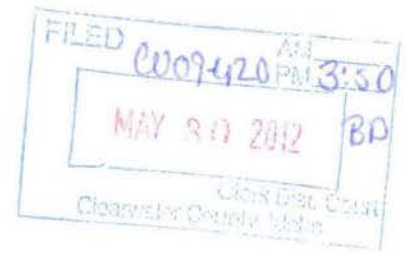
Q. All right, do you recall the date, the approximate time and the location of the accident?

A. I know it was January 7 and it was sometime about 12:40ish.

Q. A.m. or p.m.?

A. Uh, that'd be p.m.

- Q. Okay. Did, were your tires a little bit iffy as far as that kind of driving?
- A. They probably were. I um, I drove it a lot so the tires were fairly new though but as much as I drive it, it's a big possibility.
- Q. All right, uh, let's see, you were dr...do you know what your driver's license number is by any chance?
- A. Um, I could go get it.
- Q. Oh well, I have it on the police report so that's all right.
- A. Okay.
- Q. Oh I was gonna ask you, did Danielle, did she help pay for any of your travel expenses like gas or anything like that?
- A. She gave me gas money.
- Q. Gas mo...does she usually do that?
- A. What's that?
- Q. Does she usually do, help with the gas when she goes with you?
- A. Yes.
- Q. Okay, does she pay all the gas expenses or just part of it?
- A. Part of it.
- Q. Okay, what about meals and stuff. Do you eat meals and stay in rooms or do you just go straight through?
- A. Um, well I mean occasional snack and stuff.
- Q. All right, does she buy that or do you just kind a buy your own?
- A. Kind a buy our own.
- Q. Okay, let's see now uh, when you and her were getting ready to go to do Guard duty uh, did she, does she ask you if she can ride with you or do you a...just volunteer to take her or how do you make that arrangement?
- A. Uh, it was, okay at that time I had been asked by my commander and my uh, section sargent to provide transportation for her.
- Q. Okay.
- A. And then it just kind a ended up that we would prearrange our you know, when we t...when I'd pick her up and where I'd drop her off and all that so...
- Q. So they requested that you give her transportation on this particular uh...
- A. Yes.
- Q. Okay, now have they requested that before?
- A. Uh, yes.



NED A. CANNON, ISB No. 2331  
SMITH & CANNON PLLC  
508 Eighth Street  
Lewiston, ID 83501  
Telephone: (208) 743-9428  
Fax: (208) 746-8421

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendant.

Case No.: CV 09-420

**NOTICE OF HEARING**

TO: Mallory E. Larson

AND TO: Sonyalee R. Nutsch, attorney of record.

NOTICE IS HEREBY GIVEN that Plaintiff's *Motion to Strike* will be heard at the Nez Perce County Courthouse before the Honorable Carl B. Kerrick on Tuesday, June 12, 2012, at 9:00 a.m. or as soon thereafter as counsel may be heard.

DATED this 29<sup>th</sup> day of May, 2012.

  
Ned A. Cannon

**CERTIFICATE OF SERVICE**

I, Ned A. Cannon, declare that, on the date indicated below, I served a true and correct copy of this *Notice of Hearing* on Mallory Larson through her counsel via the method(s) indicated below:

Sonyalee Nutsch  
Clements Brown & McNichols  
321 13th Street  
Lewiston, ID 83501

**Via:**

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile

Signed this 29<sup>th</sup> day of May 2012, at Lewiston, Idaho.

  
Ned A. Cannon

CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

P.2/11

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

2012 JUN 5 PM 12 13

CASE NO. CV09-420

BY [Signature] DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	Case No: CV09-420
	)	
Plaintiff,	)	REPLY IN SUPPORT
	)	OF DEFENDANT'S MOTION
vs.	)	FOR SUMMARY JUDGMENT
	)	
MALLORY E. LARSON,	)	
	)	
Defendant.	)	

I.

INTRODUCTION

On January 7, 2007, Mallory Martinez fka Larson ("Ms. Martinez") was on duty with the Idaho Army National Guard when she was involved in an automobile accident with William Teurlings ("plaintiff"). On January 6, 2009, plaintiff filed his Complaint in this matter alleging one claim of negligence against Ms. Martinez. On April 26, 2012, because National Guard members are exempted from liability for state law claims arising out of their

REPLY IN SUPPORT OF  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

activities when they are in training or acting under duty, Ms. Martinez filed a Motion for Summary Judgment asking the Court to dismiss plaintiff's Complaint against her in its entirety. On May 29, 2012, plaintiff filed a Memorandum in Opposition to Motion for Summary Judgment, asserting that despite the fact that the National Guard determined that Ms. Martinez was on duty at the time of the accident, she has still failed to establish that she was acting within the course and scope of her employment at the time of the accident. This Memorandum is submitted in Reply to plaintiff's Memorandum in Opposition.

## II.

### ARGUMENT

#### **A. MS. MARTINEZ WAS ON DUTY AND BEING PAID BY THE NATIONAL GUARD AT THE TIME OF THE ACCIDENT ON JANUARY 7, 2007.**

Pursuant to Idaho Code § 6-904:

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which: ... 4. Arises out of the activities of the Idaho national guard when engaged in training or duty under sections 316, 502, 503, 504, 505 or 709, title 32, United States Code.

Idaho Code § 6-904 was last amended in 1988 and was therefore in force, as stated above, on January 7, 2007. *See id.*

32 U.S.C.A § 502 states in pertinent part that:

(a) Under regulations to be prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, each company, battery, squadron, and detachment of the National Guard, unless excused by the Secretary concerned, shall

REPLY IN SUPPORT OF  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

-2-

- (1) assemble for drill and instruction, including indoor target practice, at least 48 times each year; and
- (2) participate in training at encampments, maneuvers, outdoor target practice, or other exercises, at least 15 days each year.

It is undisputed that on January 7, 2007, Ms. Martinez was traveling to Boise, Idaho from Lewiston, Idaho where she was required to attend a monthly training pursuant to 32 U.S.C.A § 502. Plaintiff argues that because the training portion of the weekend had concluded, Ms. Martinez had completed all activities listed under 32 U.S.C.A § 502 and presumably therefore, the exemption to liability under Idaho Code § 6-904 would not apply. (*See Memorandum in Opposition to Motion for Summary Judgment, 5/29/2012, p. 5*). However, this argument ignores the plain language of the statute and the affidavit submitted by Ms. Martinez's superior officer, SSG Tony Rice.

The exemption under Idaho Code § 6-904(4) is not limited to training activities performed pursuant to 32 U.S.C.A § 502 but "training *or* duty." I.C. § 6-904(4). SSG Rice explained in his affidavit that National Guard members are on duty until 11:59 p.m. on the last day of the mandatory drill. (*See Affidavit of SSG Tony Rice, 4/26/2012, ¶ 5*). In addition, the National Guard determined in its own investigation that Ms. Martinez was on-duty at the time of the accident on January 7, 2007 and paid for her medical expenses. (*See Rice Aff., Exh. A; see also Affidavit of Mallory E. Martinez, 12/30/11, ¶ 8*). If Ms. Martinez was not on-duty, her medical bills would not have been paid by the National Guard. Therefore, the exemption under Idaho Code § 6-904(4) applies and plaintiff's Complaint

REPLY IN SUPPORT OF  
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SUMMARY JUDGMENT



should be dismissed.

**B. ON JANUARY 7, 2007, MS. MARTINEZ WAS ACTING WITH THE COURSE AND SCOPE OF HER EMPLOYMENT WITH THE NATIONAL GUARD.**

Plaintiff next argues that Ms. Martinez was not acting within the course and scope of her employment with the National Guard on January 7, 2007, when the accident in this case occurred. Plaintiff's argument is based on the application of a rule used in workers' compensation cases which "provides that an employee is ordinarily not in the course of employment when going to or coming from work." *Casey v. Sevy*, 129 Idaho 13, 17, 921 P.2d 190, 194 (Ct. App. 1996). The rule is commonly referred to as the coming and going rule to which there are numerous exceptions.

One such exception is that of the travelling employee. Pursuant to *Andrews v. Les Boise Masonry, Inc.*, 127 Idaho 65, 67, 896 P.2d 973, 975 (1995), the Supreme Court of Idaho stated the travelling employee doctrine in Idaho is as follows:

When an employee's work requires the employee to travel away from the employer's place of business *or the employee's normal place of work*, the employee will be held to be within the course and scope of employment continuously during the trip, except when a distinct departure for personal business occurs.

*Id.* (emphasis added). In *Ridgeway v. Combined Ins. Cos. of Am.*, 98 Idaho 410, 565 P.2d 1367 (1977), the court applied the travelling employee exception to a two week business trip the employee was required to take and stated that injuries incurred on the trip including "... 'injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.'" *Id.* at 411-412, 565 P.2d at 1368-69 (internal citations

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omitted).

It is undisputed that in January of 2007 Ms. Martinez lived and worked in Boise, Idaho. (See Affidavit of Ned Cannon, 5/29/12, Exh A - (Exh. F, p. 1)). As part of her employment with the Idaho National Guard, Ms. Martinez was required to drive from Boise, Idaho to Lewiston, Idaho once a month to attend required training drills. (See Martinez Aff., p. 2). Although the Guard did not pay for Ms. Martinez's traveling expenses, that factor alone is not dispositive of whether an employee will be considered a travelling employee. See *Andrews*, 127 Idaho at 67, 896 P.2d at 975.

The more significant factor is that Ms. Martinez participated in the two day drills and was paid by the National Guard for her on-duty time which ended at 11:59 p.m. on the evening of January 7, 2007. (See Cannon Aff., p. 2; see also Rice Aff., ¶ 5). In citing *Barker v. Fischbach & Moore, Inc.*, 110 Idaho 871, 872, 719 P.2d 1131, 1132 (1986), plaintiff acknowledged that compensation of an employee while they are traveling will justify a finding that the employee is a travelling employee acting within the course and scope of their employment. See *id.* Based on the facts in this case, Ms. Martinez was a travelling employee to whom the coming and going rule does not apply.<sup>1</sup>

---

<sup>1</sup> Plaintiff cites *State v. Superior Court of the State of Arizona et. al.*, 524 P.2d 951 (1974), for the proposition that the coming and going rule should apply to national guardsmen driving to training drills. In *Arizona*, the guardsman was in an accident while traveling to the training but before the time he was scheduled to report for duty. See *id.* at 953. This factor was significant to the court and there was no evidence that the guardsman was considered "on duty" at the time of the accident. In addition, state law applies to determine when an employee is acting within the course and scope of their employment. There is no discussion of any of the exceptions to the coming and going rule in the *Arizona* court's opinion so it is unclear whether, in 1974, Arizona even recognized the same exceptions to the coming and going rule that Idaho does today. Therefore, this case is distinguishable and is not controlling on the Court in reaching its determination in this case.

REPLY IN SUPPORT OF  
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SUMMARY JUDGMENT

In *Finholdt v. Cresto*, 143 Idaho 894, 155 P.3d 695 (2007), the Supreme Court of Idaho renewed its approval of a second exception to the coming and going rule for “an employee who, ‘although not at his regular place of employment, even before or after customary working hours, is doing, is on his way home from performing, or on the way from his home to perform, some special service or errand or the discharge of some duty incidental to the nature of his employment in the interest of, or under direction of his employer.’” *Id.* at 898, 155 P.3d at 699 (internal citations omitted).

It is undisputed that at the time of the accident, Ms. Martinez was carrying out a specific order from her superior officer to transport a fellow guardsman to Boise. (*See Rice Aff.*, ¶ 6; *see also Martinez Aff.*, ¶ 6). Plaintiff argues that because the other guardsman assisted in paying the gas expense incurred while traveling to Boise that it somehow negates the fact that that Ms. Martinez was complying with her superior officer’s instruction. In *Mortimer v. Riviera Apartments*, 122 Idaho 839, 840 P.2d 383 (1992), the Supreme Court of Idaho stated that “[a]n act done partly for personal reasons and partly to serve an employer is still within the scope of employment.” *Id.* at 845, 840 P.2d at 389 (internal citations omitted).

While sharing the expense was beneficial to Ms. Martinez, it doesn’t change the fact that she was acting at the direction and control of her superior officer and carrying out a special errand / order on behalf of the National Guard while traveling on January 7, 2007. Because the special errand exception also applies to the facts of this case, the Court should find that, at the time of the accident, Ms. Martinez was acting within the course and scope of her employment with the Idaho National Guard.

REPLY IN SUPPORT OF  
DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT

A third applicable exception to the coming and going rule in this case is when the employer agrees, either expressly or impliedly, that the employment relationship shall continue during the period of coming and going. *See Colorado Civil Air Patrol v. Hagans*, 662 P.2d 194 (1983). In *Hagans*, Thomas Hagans was a volunteer member of the Colorado Civil Air Patrol ("C.A.P.") who crashed in a plane during a 75 mile trip from his home while he was on his way to attend a regularly scheduled C.A.P. training. *See id.* at 195. The following facts were noted by the court:

On March 11, 1980, Hagans and his brother, who was also a C.A.P. member, left Hagans' ranch in the brother's plane to attend a regularly scheduled C.A.P. meeting. The ranch was about 75 miles away from the Lamar Municipal Airport. The mode of transportation to the meetings was the individual member's choice, and the commander of the Lamar squadron of the C.A.P. had approved of the Hagans flying to meetings. The cost of transportation was borne by the individual members. Enroute to the meeting, Hagans and his brother received word that they could not land at Lamar because of weather conditions. After turning around to return to the ranch, the plane crashed and Hagans was injured.

The referee found that Hagans was considered to be under C.A.P. jurisdiction from the time of leaving home until his return following the meeting, and that the only purpose for undertaking the travel was to attend the meeting.

*Id.*

The court agreed that "traveling to attend [the training] was included in the activity by necessity; that Hagans' duty encompassed all of his activity from leaving for the meeting until his return; that he was traveling at the behest of his employer; that, therefore, his injury during travel arose out of and in the course of his employment; and that Hagans'

REPLY IN SUPPORT OF  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

activities generated some benefit to the C.A.P. and, thus, had a dual purpose." *Id.* The court acknowledged the coming and going rule but found an exception applied.

Among such special circumstances is the exception that an employer may agree, expressly or impliedly, that the employment relation shall continue during the period of coming and going. . . . Such an agreement may be inferred here. The C.A.P. commander testified that, under patrol regulations, its members are pursuing C.A.P. duties from the time they leave home to attend a meeting until they return. This testimony supports the finding of the Commission that "traveling to attend was included in the activity by necessity; the duty of claimant encompassed all of his activity from the moment of entering the aircraft to depart for the meeting, through the time of travel."

Thus, when a claimant, at the time of his injury, is performing a duty with which he is charged as a part of his contract for service, or under the express or implied direction of his employer, he is within the course of his employment under the Workmen's Compensation Act.

*Id.* at 196 (internal citations omitted).

The C.A.P. analysis is the most comparable to the employment situation that exists between Ms. Martinez and the Idaho National Guard. As with the C.A.P., Idaho National Guard has agreed, either expressly or impliedly, that the employment relation continues during the period of coming and going. *See id.* This agreement is apparent based on the following facts: Ms. Martinez was on duty until 11:59 p.m. on January 7, 2007; she was being paid at the time of the accident by the National Guard; she was complying with a direct order from her superior officer to transport a fellow guardsman to Boise, Idaho; and because Ms. Martinez was injured "in the line of duty," her medical bills incurred as a result of the accident were paid by the Army National Guard. (*See Martinez Aff.*, pp.2-3, Exh A;

REPLY IN SUPPORT OF  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

*see also* Rice Aff., pp. 2-3, Exh. A). Ms. Martinez's traveling to Boise was within the course and scope of her employment with the National Guard.

Of course, this entire analysis is redundant in light of the fact the National Guard Bureau already completed an Investigation / Line of Duty Report and determined that Ms. Martinez was acting "in the line of duty" at the time of the accident. *See id.* However, even if the Court were to strike that testimony from the record, the remaining facts are just as strong for this Court to reach the same conclusion as the National Guard that Ms. Martinez was acting within the course and scope of her employment and pursuant to duty on January 7, 2007.


### III.

#### CONCLUSION

Because, in accordance with Idaho Code § 6-904(4), Idaho National Guard members cannot be held liable for state law claims arising out of their activities when they are acting within the course and scope of their employment, and pursuant to duty, plaintiff's Complaint should be dismissed.

DATED this 5<sup>th</sup> day of June 2012.

CLEMENTS, BROWN & McNICHOLS, P.A.

By   
SONYALEE R. NUTSCH  
Attorneys for Defendant

REPLY IN SUPPORT OF  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

CERTIFICATE OF SERVICE

I hereby certify that on the 5<sup>th</sup> day of June 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith & Cannon PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501  
Fax: (208) 746-8421

☐ U.S. MAIL  
☒ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☐ TELECOPY (FAX)

  
Sonyalee R. Nutsch

REPLY IN SUPPORT OF  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT



Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
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Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

CARRIE BIRD  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
GROFINO, IDAHO ✓

2012 JUN 5 PM 12 04

CASE NO. CV09-420

BY ps DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	Case No: CV09-420
	)	
Plaintiff,	)	AFFIDAVIT OF SONYALEE
	)	R. NUTSCH IN SUPPORT OF
vs.	)	DEFENDANT'S RESPONSE IN
	)	OPPOSITION TO PLAINTIFF'S
MALLORY E. LARSON,	)	MOTION TO STRIKE
	)	
Defendant.	)	
_____	)	
STATE OF IDAHO	)	
	) ss.	
County of Nez Perce	)	

SONYALEE R. NUTSCH, being first duly sworn on oath, deposes and says:

1. I am an adult citizen of the United States of America, over the age of twenty-one (21), competent to testify as a witness, and make this affidavit on personal knowledge.

AFFIDAVIT OF SONYALEE R.  
NUTSCH IN SUPPORT OF  
DEFENDANT'S RESPONSE IN  
OPPOSITION TO PLAINTIFF'S  
MOTION TO STRIKE

2. I am one of the attorneys representing the defendant in this matter.


3. On April 26, 2012, I contacted Ned Cannon, counsel for the plaintiff, and informed him that I was cancelling the deposition I had noticed up of SSG Tony Rice. I explained to Mr. Cannon that I had noticed up the deposition because I was unable to get a hold of SSG Rice. I learned on April 26, 2012, that he had been out of the country and was willing to sign an Affidavit, negating the need for his deposition. I provided Mr. Cannon with SSG Rice's phone number and best contact time. A fair and accurate copy of the e-mail I sent to Mr. Cannon in follow-up to our phone conversation earlier that day is attached as Exhibit A. SSG Rice's phone number has been redacted to maintain his privacy.

4. To date, I have never received a request from plaintiff's counsel for available dates to take the depositions of my client, Mallory Martinez, SSG Tony Rice, or any other witnesses in this case.

  
SONYALEE R. NUTSCH

SUBSCRIBED AND SWORN to before me this 4<sup>th</sup> day of June 2012.



  
Notary Public in and for the State of Idaho  
residing at Lewiston, therein.  
My Commission Expires: 9-15-2017

AFFIDAVIT OF SONYALEE R.  
NUTSCH IN SUPPORT OF  
DEFENDANT'S RESPONSE IN  
OPPOSITION TO PLAINTIFF'S  
MOTION TO STRIKE

CERTIFICATE OF SERVICE

I hereby certify that on the 4<sup>th</sup> day of June 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith, Cannon & Bond PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501

  X   U.S. MAIL  
     HAND DELIVERED  
     OVERNIGHT MAIL  
     TELECOPY (FAX)

  
Sonyalee R. Nutsch

AFFIDAVIT OF SONYALEE R.  
NUTSCH IN SUPPORT OF  
DEFENDANT'S RESPONSE IN  
OPPOSITION TO PLAINTIFF'S  
MOTION TO STRIKE

**Sonyalee**

---

**From:** Sonyalee [snutsch@clbrmc.com]  
**Sent:** Thursday, April 26, 2012 5:39 PM  
**To:** 'Ned Cannon'  
**Subject:** Re: SSG Rice

Ned,

SSG Rice signed his affidavit today. We noticed up the deposition because we couldn't get him to respond to my letters. Come to find out, he was in Cambodia doing a peace keeping mission. I mailed a copy to you with our motion so you should receive it tomorrow. The affidavit is pretty straight forward so I'm not sure you will have any questions but if you do, SSG Rice's phone number is ' He does not have to work on Fridays so he said that was the best time to contact him.

SN

Sonyalee R. Nutsch  
Attorney  
Clements, Brown & McNichols, P.A.  
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Lewiston, Idaho 83501  
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---

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ISB # 6189

CARRIE L. RUD  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO  
2012 JUN 5 PM 12 04  
CASE NO. CV09-420  
BY BS DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	Case No: CV09-420
	)	
Plaintiff,	)	AFFIDAVIT OF SONYALEE
	)	R. NUTSCH IN SUPPORT OF
vs.	)	DEFENDANT'S RESPONSE IN
	)	OPPOSITION TO SWIFT
MALLORY E. LARSON,	)	TRANSPORTATION'S MOTION
	)	TO INTERVENE
Defendant.	)	
_____ )		
STATE OF IDAHO	)	
	) ss.	
County of Nez Perce	)	

SONYALEE R. NUTSCH, being first duly sworn on oath, deposes and says:

1. I am an adult citizen of the United States of America, over the age of twenty-one (21), competent to testify as a witness, and make this affidavit on personal

AFFIDAVIT OF SONYALEE  
R. NUTSCH IN SUPPORT OF  
DEFENDANT'S RESPONSE IN  
OPPOSITION TO SWIFT  
TRANSPORTATION'S MOTION  
TO INTERVENE



knowledge.

2. I am one of the attorneys representing the defendant in this matter.

3. I have had various phone conversations with plaintiff's attorney, Ned Cannon, throughout the litigation of this case. Mr. Cannon has stated to me on several occasions that any settlement of the case will need to include the significant Worker's Compensation subrogation being claimed by Swift.

4. The last phone conversation I had with Mr. Cannon was on April 26, 2012. I informed Mr. Cannon, as I had on several prior occasions, that my client was not in a position to consider settlement negotiations or participate in a mediation until discovery was completed and dispositive motions resolved. Mr. Cannon made reference to the Swift Transportation subrogation claim during this phone conversation.

5. Had settlement discussions occurred or a mediation been scheduled, as a significant subrogation claimant, I would have insisted that Swift, through its counsel Mark Peterson, been involved so that a global Release could have been obtained should settlement have occurred.



Sonyalee R. Nutsch  
SONYALEE R. NUTSCH

SUBSCRIBED AND SWORN to before me this 4<sup>th</sup> day of June 2012.

Christine A. Moore  
Notary Public in and for the State of Idaho  
residing at Lewiston, therein.  
My Commission Expires: 9-15-2017

AFFIDAVIT OF SONYALEE R.  
NUTSCH IN SUPPORT OF  
DEFENDANT'S RESPONSE IN  
OPPOSITION TO SWIFT  
TRANSPORTATION'S MOTION  
TO INTERVENE

CERTIFICATE OF SERVICE

I hereby certify that on the 4<sup>th</sup> day of June 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Sonyalee R. Nutsch

AFFIDAVIT OF SONYALEE R.  
NUTSCH IN SUPPORT OF  
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ISB # 6189

CARRIE BIRD  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2012 JUN 5 PM 12 04 ✓

CASE NO. CV09-420

BY BSO DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	Case No: CV09-0420
	)	
	)	DEFENDANT'S RESPONSE IN
Plaintiff,	)	OPPOSITION TO PLAINTIFF'S
	)	MOTION TO STRIKE
vs.	)	
	)	
MALLORY E. LARSON,	)	
	)	
	)	
Defendant.	)	

I.

INTRODUCTION

On April 26, 2012, Mallory Martinez fka Larson ("Ms. Martinez" or "defendant") filed a Motion for Summary Judgment due to the fact that she was on duty with the Idaho National Guard at the time of the accident that is the subject matter of William Teurlings' ("plaintiff") Complaint. In support of that Motion, defendant filed

DEFENDANT'S RESPONSE IN  
OPPOSITION TO PLAINTIFF'S  
MOTION TO STRIKE

two affidavits. On May 29, 2012, plaintiff filed a Motion to Strike certain paragraphs of those Affidavits. This Response is submitted in opposition to plaintiff's Motion to Strike. As explained below, the paragraphs and exhibit identified by plaintiff should not be stricken from the Affidavits of SSG Tony Rice or Ms. Martinez.

## **II.**

### **ARGUMENT**

#### **A. SSG Tony Rice and Mallory Martinez's Affidavits Do No Contain Inadmissible Legal Conclusions**

Paragraph 5 of SSG Tony Rice's Affidavit states: "January 7, 2007, was the final day of one of the 145<sup>th</sup>'s regularly scheduled instruction drills in Lewiston, Idaho and SPC Mallory Larson was in attendance. SPC Larson was on duty from 12:00 a.m. from January 6, 2007 to 11:59 p.m. on January 7, 2007." Paragraph 6 of Ms. Martinez's Affidavit states that "[a]t the time of the accident on January 7, 2007, I was on duty with the Idaho National Guard and was acting under my superior's orders by transporting a fellow guardsman to Boise, Idaho." Ms. Martinez's superior officer is SSG Rice.

Paragraph 7 of SSG Rice's Affidavit states:

SPC Larson notified me of the accident after it occurred. A Line of Duty Report of Investigation was completed. The result of the investigation determined that SPC Larson was on duty at the time of the accident and her medical bills were paid as a result of that determination. A fair and accurate copy of the Report of Investigation which is maintained as a regular course in the personnel file of SPC Larson of which I am personally familiar, is Attached as Exhibit A....

Paragraph 7 of Ms. Martinez's Affidavit states:

After the accident, I reported it to SSG Rice and an investigation was completed to determine if I was on duty. I cooperated in that investigation and received a copy of the report once it was completed. A fair and accurate copy of the report I received is attached as Exhibit A...

As the superior officer of Ms. Martinez, SSG Rice would know when Ms. Ms. Martinez, as well as himself, was considered to be “on duty” for the purpose of the Idaho National Guard’s policies and procedures. While this factual question is what the Motion for Summary Judgment turns on, it doesn’t change the fact that it is a factual question of which SSG Rice has personal knowledge to which he can testify. Similarly, Ms. Martinez knew she was getting paid by the guard until 11:59 p.m. on January 7, 2007 and notified her supervising officer after the accident. All of which is consistent with her understanding that she was “on duty,” a factual question that as a member of the National Guard, she would have personal knowledge of.

As explained below, because the document attached to the Affidavits as Exhibit A is admissible pursuant to the Records of Regularly Conducted Activity and the Public Records and Reports exceptions to the hearsay rule, the information contained in that report is likewise not an inadmissible legal conclusion but rather a factual determination of which SSG Rice and Ms. Martinez were personally involved in and of which they were made aware.

**B. Exhibit A to SSG Rice and Ms. Martinez’s Affidavits is Admissible Pursuant to the Records of Regularly Conducted Activity and Public Records and Reports Exceptions to the Hearsay Rule**

Idaho Rule of Evidence 803(6) and (8) state the following documents are

admissible even though they contain hearsay:

**(6) Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

...

**(8) Public Records and Reports.** Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (A) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (B) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party; (C) factual findings offered by the government in criminal cases; (D) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

As explained by SSG Rice, Exhibit A attached to his Affidavit is a Line of Duty Report that was completed after the accident in this case. This report is kept during

the regular course of the Idaho National Guard in Ms. Martinez' personnel file which SSG Rice, as her superior officer, is personally familiar with. As such, SSG Rice is a qualifying witness pursuant to Idaho Rule of Evidence 902(11) and has met all criteria to establish the admissibility of Exhibit A as a record of regularly conducted business pursuant to Idaho Rule of Evidence 803(6).

In addition, the National Guard is a public office or agency which issued this Line of Duty Report as factual findings resulting from an investigation made pursuant to authority granted by law. Therefore, the Line of Duty Report is also admissible pursuant to Idaho Rule of Evidence 803(8).

**C. Plaintiff's Request for Relief Pursuant to I.R.C.P. 56(f)**

Plaintiff's final request is that if the Court denies his Motion to Strike that he requests additional time to depose the affiants. Other than the time that she was deployed, Ms. Martinez has been available for over two years for her deposition to be taken and plaintiff's counsel has never once requested to do so. (*See* Affidavit of Sonyalee R. Nutsch in Support of Defendant's Response in Opposition to Plaintiff's Motion to Strike, ¶ 4). SSG Rice's contact information was provided to plaintiff's counsel on April 26, 2012 and no attempt to take his deposition has been made by plaintiff. (*See id.* at ¶ 3). The request for additional depositions is just a delay tactic to avoid having the Court rule on Defendant's Motion for Summary Judgment. Defendant respectfully requests the Court rule on her Summary Judgment Motion without the delay requested.


III.

CONCLUSION

Based on the foregoing, defendant respectfully requests that Plaintiff's Motion to Strike be denied.

DATED this 4<sup>th</sup> day of June 2012.

CLEMENTS, BROWN & McNICHOLS, P.A.

By   
SONYALEE R. NUTSCH  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 4<sup>th</sup> day of June 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
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Sonyalee R. Nutsch

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ISB # 6189

ERRIE BIRD  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
CROFINO, IDAHO  
2012 JUN 5 PM 12 04  
CASE NO. CV09-420  
BY RB DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	Case No: CV09-0420
	)	
	)	DEFENDANT'S RESPONSE IN
Plaintiff,	)	OPPOSITION TO SWIFT
	)	TRANSPORTATION'S MOTION TO
vs.	)	INTERVENE
	)	
MALLORY E. LARSON,	)	
	)	
	)	
Defendant.	)	
_____	)	

I.

INTRODUCTION

On May 29, 2012, Swift Transportation Company ("Swift"), served on counsel for the existing parties a Motion to Intervene in this case. Swift is an entity that paid workers compensation benefits to William Teurlings ("plaintiff") after the accident that is the subject matter of plaintiff's Complaint. As explained below, Swift's Motion to

DEFENDANT'S RESPONSE IN  
OPPOSITION TO SWIFT  
TRANSPORTATION'S MOTION  
TO INTERVENE

Intervene should be denied.

## **II.**

### **FACTUAL BACKGROUND**

On January 7, 2007, Mallory Martinez fka Larson ("Ms. Martinez") was on duty with the Idaho Army National Guard when she was involved in an automobile accident with plaintiff. At the time of the accident, plaintiff was an employee of Swift and was driving a Swift semi-truck. According to Swift, on April 23, 2008, it entered into a Compromise and Release agreement with plaintiff to settle his worker's compensation claim with Swift for Fifty Five Thousand Dollars (\$55,000). (*See* Memorandum in Support of Motion to Intervene, 5/25/12, p. 2).

On January 6, 2009, plaintiff filed his Complaint in this matter alleging one claim of negligence against Ms. Martinez. Plaintiff's damages claimed in his Complaint were damages including but not limited to, "bodily injury, emotional distress, medical expenses, and economic losses, together with future damages for person injury proximately caused by defendant's negligence." (Plaintiff's Complaint, 1/6/2009, p. 2).

On July 23, 2010, counsel for Ms. Martinez received correspondence from Mark Peterson. (*See* Affidavit of Mark C. Peterson in Support of Motion to Intervene, 5/25/2012, Exhibit A). Mr. Peterson informed counsel that Swift has paid workers' compensation benefits to plaintiff and "[t]o the extent that Teurlings is entitled to an award of damages against Mallory Larson (Larson) for the injuries Teurlings sustained in the traffic accident, the surety has the right to recover from all damages awarded



Teurlings for the compensation it had paid to Teurlings.” *Id.* Mr. Peterson also stated, “[i]f Teurlings and Larson are interested in settling the case, my clients are willing to participate in settlement negotiations.” *Id.* Ms. Martinez's counsel responded to correspondence from Mr. Peterson keeping him apprised of the status of the stay of the litigation as a result of Ms. Martinez's deployment to active duty. (*See* Peterson Aff., Exh(s). C & E). After the stay was lifted, Mr. Peterson sent letters on January 9, 2012 and March 7, 2012, stating that Swift was still asserting its subrogation interest and asking to be included in any mediation or other efforts to settle the case. (*See id.* at Exh(s). F & G).

To date, no settlement discussions of any kind have taken place and mediation has not been scheduled in this case. (*See* Affidavit of Sonyalee R. Nutsch, 6/4/12, ¶ 4). Had such discussions occurred or a mediation been scheduled, as a significant subrogation claimant, defense counsel would have insisted that Mr. Peterson be involved so that a global Release could have been obtained should settlement have occurred. *See id.* at ¶ 5.

### III.

#### ARGUMENT

##### A. SWIFT’S MOTION TO INTERVENE AS A MATTER OF RIGHT SHOULD BE DENIED

Idaho Rule of Civil Procedure 24(a) requires the following be met for an applicant to be allowed to intervene as a matter of right:

Upon timely application anyone shall be permitted to

intervene in an action: (1) when a statute of the state of Idaho confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Swift argues in its Memorandum that Idaho Code §72-223 is the Idaho statute which confers the unconditional right of Swift to intervene in this matter. Specifically, Swift argues that “Idaho Code §72-223(3) confers on an employee the right to join an action between its employee and a third party tortfeasor to recover damages.” (Memorandum in Support of Motion to Intervene, 5/25/2012, p. 6).

Idaho Code §72-223(3) states an “[a]ction may be instituted against such third party by the employee, or in event compensation has been claimed and awarded, by the employee and employer jointly, in the employee's name, or, if the employee refuses to participate in such action, by the employer in the employee's name.” Fourth Judicial District, Judge Darla Williamson, recently addressed whether Idaho Code §72-223(3) gives an employer who has paid workers’ compensation benefits the right to join a personal injury suit brought against a third party by its employee. In holding that the statute did not confer such a right, Judge Williamson stated:

The Plaintiff cites to Idaho Code section 72-223(2) in support of his argument that the City should be named as a plaintiff. Section 72-223(2) states: “Action may be instituted against such third party by the employee, or in the event compensation has been claimed and awarded, by the employee and employer jointly, in the employee's name, or, if

the employee refuses to participate in such action, by the employer in the employee's name.”

Nothing in section 72-223(2) gives the City the right to join this action as a named party. It gives the City the right to institute an action against a third party, here Ada County, but only in the employee's name. This section in fact appears to contradict the Plaintiff's argument because it says that the City may only sue in the employee's name. The Court therefore denies the Plaintiff's Motion to Add Boise City as a Party.

*Ruffing v. Ada County Paramedics*, 2009 WL 7366868, p.5 (Idaho Dist.) (attached as Appendix A).

Because there is no Idaho statute that confers an unconditional right for Swift to intervene in this case, in order to do so, Swift must show that it has such an interest relating to the property or transaction that is the subject matter of the case that disposition of the action may impair or impede Swift's ability to protect that interest *unless* Swift's interest is being adequately represented by existing parties. *See* I.R.C.P. 24(a)(2).

Although we have no Idaho case addressing whether a subrogation claimant who has a right of recovery if a judgment is awarded in a personal injury case meets the criteria of Idaho Rule of Civil Procedure 24(a)(2), the Supreme Court of Virginia did recently address the issue with a similar rule in *Hudson v. Jarrett*, 606 S.E.2d 827 (2005). In *Hudson* the court held that neither the employer nor the employer's workers' compensation carrier was entitled to intervene in the underlying personal injury case. The court held:

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OPPOSITION TO SWIFT  
TRANSPORTATION’S MOTION  
TO INTERVENE

The claim of the intervenors in this case is limited to the protection of their right to reimbursement from the employee's third-party recovery for the amounts paid in compensation benefits. . . . In other words, Signal and Universal have a lien on any proceeds Hudson may recover in his action against Jarrett and Cooper, but Signal and Universal do not have a cause of action against Jarrett and Cooper based on Hudson's injuries. . . .

In their motion to intervene and motion for judgment in this case, Signal and Universal did not raise a claim against Hudson, Jarrett, or Cooper. The only relief sought was entry of a judgment against any proceeds awarded to Hudson for the amount of the workers' compensation paid Hudson. Furthermore, on brief and at oral argument, the intervenors stated that they "do not want to participate in the trial." They seek only to "follow" the trial and "be assured" their lien is protected.

While intervention under Rule 3:19 is within the discretion of the trial court, the intervention must meet the requirements of the Rule. The allegations of the intervenors here fall far short of showing any claim that they could assert as a plaintiff or defendant that is germane to the issues in the tort case.

*Hudson*, 606 S.E.2d at 831 (internal citations omitted).

Even if this Court were to determine that a subrogation claim is an independent claim that complies with the requirements of Idaho Rule of Civil Procedure 24(a)(2), Swift has failed to demonstrate that its interest is not adequately being represented by the plaintiff in this case. Swift argues that "[i]t is proper to allow intervention where an applicant shows merely that he 'may' be bound by the judgment or representation as to him 'may' be inadequate." (See Memo. in Support, p. 5). Swift cites *Duff v. Draper*, 96 Idaho 299, 302 (1974) as support for this proposition. See *id.* *Duff*,

however, was decided based on a previous version of Idaho Rule of Civil Procedure 24(a)(2) which contained significantly different language. The current version of Rule 24(a)(2) does not contain the word “may” to modify the showing required whereas the previous version of the rule did. *See Duff*, 96 Idaho at 301. The current version of Rule 24(a)(2) simply states if the additional requirements of the rule are met, intervention will be allowed “*unless* the applicant's interest is adequately represented by existing parties.” *Id.* (emphasis added).

In *The Vanderford Co., Inc., v. Knudson*, 2008 WL 41890006 (Idaho Dist.)(attached as appendix B), Third Judicial District Judge Thomas Ryan looked to federal case law for guidance in determining what is required to prove whether the intervening applicant's interest are being adequately represented by the existing parties. Judge Ryan held:

There are three factors used in determining the adequacy of representation: (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir.2003). . . .

The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties. *Id.* **When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. *Id.* If the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation. *Id.***

*The Vanderford Co., Inc.*, 2008 WL 41890006 at p. 3.

Plaintiff pled all economic damages in his Complaint and has asserted the Workers' Compensation lien as part of his damage calculations during discussions with defense counsel. (*See Nutsch Aff.*, ¶¶ 3-4). Because Swift has a subrogation claim against any recovery plaintiff may obtain in this case, plaintiff and Swift's interest are identical. Swift and plaintiff's share the same interest of obtaining the largest recovery possible for plaintiff's alleged injuries in this action. Swift has failed to show that plaintiff will not make all arguments necessary to assert a claim for the economic damages paid by Swift or that Swift would offer any necessary element to the proceedings that plaintiff's counsel would neglect. *See The Vanderford Co., Inc.*, 2008 WL 41890006 at p. 3.

Failing to respond to correspondence that requests to be involved in settlement discussions or mediation when neither has occurred, is not enough to overcome the presumption of adequate representation that exists because plaintiff and Swift's interest in this case are identical. (*See id*; *see also Nutsch Aff.*, ¶ 4). Therefore, plaintiff's Motion to Intervene as a Matter of Right should be denied.

**B. SWIFT'S MOTION FOR PERMISSIVE INTERVENTION SHOULD BE DENIED**

Swift asserts that if this Court denies its Motion to Intervene as a Matter of Right, it should be entitled to permissive intervention. (*See Memo. in Support*, p. 7). Permissive intervention is permitted: "(1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a

question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” I.R.C.P. 24(b). In support of permissive intervention, Swift repeats its argument that Idaho Code §72-223(3) confers on an applicant “the right to join an action between its employee and a third-party tortfeasor” and is therefore also the Idaho statute which confers a conditional right to intervene as required by Idaho Rule of Civil Procedure 24(b). (*See* Memo. in Support, p. 7). As explained *supra*, Judge Williamson specifically rejected the argument that Idaho Code §72-223(3) confers on an employer the right to join an action between the employee and third-party tortfeasor and found that once the action is brought by the employee, the exact opposite is true. *See Ruffing v*, 2009 WL 7366868, at p.5.

In the alternative, Swift argues that its subrogation claim is a separate claim or defense that has a question of law or fact in common with the main action because its claim “goes to damages in the present action...” and “[p]ursuant to Idaho Code § 72-223(3), Applicant has all the claims or defenses in the main action as the Plaintiff against Defendant.” (Memo. in Support, p. 7). Idaho Code § 72-223(3) however only states that “[i]f compensation has been claimed and awarded, the employer having paid such compensation or having become liable therefor, shall be subrogated to the rights of the employee, to recover against such third party to the extent of the employer's compensation liability.”

Nothing in the statute allows for the employer to bring a separate claim



against the allegedly negligent third party once the employee has already filed the Complaint. Swift's right of subrogation as to the amount it has paid plaintiff as workers' compensation benefits has no bearing on the legal and factual determinations that must be made as to whether or not Ms. Martinez can be found liable in this matter.

Finally, the last sentence of Idaho Rule of Civil Procedure 24(b) states that "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Because the claim Swift wants to intervene to present in this action is part of the same claim for damages being made by plaintiff, the prejudice to Ms. Martinez to have to defend plaintiff and his subrogation provider(s) would be significant. In addition, the potential for confusion to the jury of having duplicate claims presented would also create undue delay and prejudice. If a subrogation claim was enough to justify permissive intervention, a trial could easily consist of evidence presented by the plaintiff and every medical insurer, workers compensation insurer and other carriers who paid any moneys in the aftermath of an accident to the plaintiff. This is not the type of claim or party for which intervention should be permitted and Swift's Motion in the Alternative for Permissive Intervention, should be denied.

**C. SWIFT'S MOTION FOR INTERVENTION SHOULD BE DENIED FOR FAILURE TO COMPLY WITH I.R.C.P. 24(C)**

Idaho Rule of Civil Procedure 24(c) states that "[a] person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion

shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.”

Swift has failed to accompany their Motion to Intervene with a pleading setting forth the claim or defenses for which intervention is sought as required by the rules. Perhaps this is because the pleading would be identical to the plaintiff's Complaint already filed which further supports the reasons why Swift's Motion to Intervene should be denied.


#### IV.

#### CONCLUSION

Based on the foregoing, defendant respectfully requests that Swift's Motion to Intervene be denied.

DATED this 4<sup>th</sup> day of June 2012.

CLEMENTS, BROWN & McNICHOLS, P.A.

By   
SONYALEE R. NUTSCH  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 4<sup>th</sup> day of June 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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  X   U.S. MAIL  
     HAND DELIVERED  
     OVERNIGHT MAIL  
  X   TELECOPY (FAX)

  
Sonyalee R. Nutsch

# Appendix A

**H**

Idaho District Court,  
Fourth Judicial District.  
Ada County  
Charles RUFFING, an individual, Plaintiff,  
v.  
ADA COUNTY PARAMEDICS, Barbara Lindy McPherson, and John Does I through II, Defendants.  
No. CV PI 0500246.  
November 20, 2009.

Memorandum Decision and Order Regarding Defendants' Motions in Limine and Plaintiff's Motion to add Boise City as a Party

Darla Williamson, District Judge.

Hearing on Defendants' Motions in Limine, Plaintiff's Motion to Compel, and Plaintiff's Motion to Add Boise City as a Party were heard on November 18, 2009. Richard S. Owen argued on behalf of Plaintiff, and Ray J. Chacko and James K. Dickenson on behalf of Defendants.

FACTS AND PROCEDURAL BACKGROUND

Before the Court at the November 18, 2009, hearing were three motions. The Court took Defendants' Motions in Limine and Plaintiff's Motion to Add Boise City as a Party under advisement. The Court ruled from the bench on Plaintiff's Motion to Compel, directing counsel for Plaintiff to submit an order to the Court ordering Defendants to turn over the training records for Defendant Barbara McPherson by November 20, 2009. The Court also ordered Plaintiff to produce the personnel files for Barbara McPherson to the Court by November 20, 2009, so that the Court could conduct an in-camera review of the files.

*1) DEFENDANTS' MOTIONS IN LIMINE*

Defendants have filed four Motions in Limine: 1) Motion in Limine to Exclude Evidence Pursuant to Idaho Rule of Evidence (I.R.E.) 407; 2) Motion in Limine to Exclude Evidence Pursuant to I.R.E. 409; 3) Motion in Limine to Exclude Expert Testimony of Parker Sheehan; and 4) Motion in Limine to Exclude Expert Testimony of Karen Meredith.

LEGAL STANDARD

A motion in limine enables a judge to rule on evidence without first exposing the evidence to the jury, thus avoiding juror bias that may be generated by objections to the evidence during trial and allows counsel, on both sides, to make strategic decisions before the trial concerning the context and order of the evidence to be presented. Davidson v. Beco Corp., 112 Idaho 560, 563, 733 p.2d 781, 784 (1986); State v. Young, 136 Idaho 113, 120, 29 P.3d 949, 956 (2001). I.R.E. 103(c) directs that proceedings shall be conducted so as to prevent inadmissible evidence from being suggested to the jury, to the extent practicable. The trial court may reconsider a motion in limine at any time, including when the actual presentation of facts is made. Warren v. Sharp, 139 Idaho 599, 605, 83 P.3d 773, 779 (2003). The court has considerable discretion in excluding evidence if it will be prejudicial or lead to confusion of the jury. Burgess v. Navistar Int'l Trasp. Corp., 121 Idaho 643, 827 P.2d 790.

## ANALYSIS

1) Motion to Exclude Evidence Pursuant to I.R.E. 407

Defendants argue that pursuant to I.R.E. 407 Plaintiff may not present evidence at trial that Ada County installed backing cameras and monitors in a number of ambulances, including the ambulance involved in this incident, after the incident involving the Plaintiff. I.R.E. 407 provides, in relevant part, “[w]hen, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct....” The rule does allow such evidence if offered for other purposes, such as “proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.”

Plaintiff responded that he would seek to introduce evidence of backing monitors subsequently installed not as evidence of a remedial measure, but to demonstrate that the ambulances used by Ada County were not all the same. Plaintiff argues this evidence will go to how the Plaintiff interacted with the ambulance. However, when questioned at the hearing on November 18, 2009, counsel for Plaintiff did not know whether the Plaintiff knew at the time of the incident whether the ambulance in question had a backing camera installed or not. It appears that the prejudicial effect of the jury knowing that Ada County installed backing monitors after the incident with the Plaintiff will outweigh any probative value of the evidence as to the Plaintiff's interaction with the ambulance. The court therefore finds that evidence of such subsequent remedial measure is inadmissible under I.R.E. 407.

2) Motion to Exclude Evidence Pursuant to I.R.E. 409

The second evidence that Defendants argue is inadmissible, pursuant to I.R.E. 409, is evidence that Ada County paid money to a third party who owned a car that was struck and damaged during the same incident as the Plaintiff. I.R.E. 409 states that “[e]vidence of furnishing or offering or promising to pay medical, hospital, funeral, or similar expenses occasioned by an injury or death, or damage to or loss of property of another, is not admissible to prove liability for the injury, death, or damage.”

Plaintiff concedes that the evidence is not admissible to prove liability or culpability. The Plaintiff argues, however, that evidence of the payment is admissible to demonstrate that it is a policy of Ada County to assume responsibility for any damage their ambulances caused. The Plaintiff argues the fact that the Defendants have denied any responsibility or liability for the injury to the Plaintiff demonstrates an inconsistency with the policy of Ada County and should be brought to the attention of the jury.

Such evidence would be evidence that Ada County furnished payment for damage to property of another and therefore under I.R.E. 409 is not admissible to prove liability for the injury caused to the Plaintiff. Plaintiff's argument that an inconsistency is demonstrated by Ada County paying for the car but not paying the Plaintiff is without merit. That argument assumes that that Ada County paying for the damage to the car means that it assumes liability for the damage. The argument also fails to consider the fact that Ada County has denied all liability in the incident involving the Plaintiff, and has alleged that the Plaintiff was at least contributorily negligent. Therefore, any probative value the evidence may have for other reasons such as demonstrating any policies of Ada County seems to be outweighed by the prejudicial effect of appearing that Ada County had admitted liability. The court finds that evidence of payment to the third party for damage to the vehicle is inadmissible under I.R.E. 409.

## 3) Motions to Exclude Expert Testimony of Parker Sheehan and Karen Meredith

Defendants have filed two Motions in Limine to exclude testimony, pursuant to I.R.E. 702, by two of Plaintiff's named experts: Parker Sheehan and Karen Meredith. Defendants argue that both witnesses should not be allowed to



testify as experts because they are not qualified and because their testimony will be based on speculation and unsubstantiated facts.

The court has broad discretion in determining whether a witness is qualified as an expert. Weeks v. Eastern Idaho Health Services, 143 Idaho 834, 837 153 P.3d 1180, 1183 (2007). The rule governing the admissibility of expert testimony is I.R.E. 702, which states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." A party seeking to offer expert testimony must first demonstrate that the witness is qualified as an expert on the matter at hand. State v. Hopkins, 113 Idaho 679, 680, 747 P.2d 88, 89 (Idaho Ct. App. 1987) (internal citation omitted). The party seeking to put on expert testimony has the burden of demonstrating that the witness is qualified as an expert. Weeks, 143 Idaho at 837, 153 P.3d at 1183. If a witness is determined to be qualified as an expert, the court must next determine if the testimony will assist the trier of fact in understanding the evidence. Hopkins, 113 Idaho at 680-81, 747 P.2d at 89-90. A two part analysis must therefore be conducted to determine if an expert may testify at trial: 1) whether the individual is qualified; and 2) whether the testimony to be proffered is admissible.

#### *i) Qualification of Witness as an Expert*

A witness is qualified to testify as an expert if he or she has specialized knowledge that will assist the trier of fact in understanding the evidence or determining a fact in issue. Jones v. Jones, 117 Idaho 621, 627, 790 P.2d 914, 920 (1990). In determining if an expert is qualified, the court should also take into account I.R.E. 703. Egbert v. Idaho State Ins. Fund, 125 Idaho 678, 680, 873 P.2d 1332, 1334 (1994). I.R.E. 703 states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

The court may allow an expert to render an opinion based in part on hearsay or other inadmissible evidence if the expert testifies as to the specific basis of his or her opinion and reaches an opinion through his or her own independent judgment. Egbert, 125 Idaho at 680, 873 P.2d at 1334.

The Egbert case is factually similar to the proffered testimony of Karen Meredith. In Egbert, there was an automobile accident resulting in injury to the plaintiff. *Id.* at 679, 1333. The trial court refused to admit testimony of a claim supervisor for the State Insurance Fund regarding an estimate of the future medical and disability benefits that the State Insurance Fund would pay to the plaintiff. *Id.* The grounds of the rejection were that the claims supervisor did not have the medical expertise that was necessary to lay a foundation for the estimates. *Id.* The Idaho Supreme Court found that the trial court had not abused its discretion in refusing to allow the testimony. *Id.* at 680, 1334. However, the Court stated that it would have been proper to allow the claims supervisor to testify as to future payments for medical procedures based on a review of the claim file, and medical reports and evaluations contained in the file, in estimating future payments. *Id.* The court held that it was proper to refuse to allow the testimony because it had not been proven that the plaintiff was completely disabled. *Id.* The court reasoned that the claims supervisor could not resolve the disputed issue of whether the plaintiff was fully medically disabled because that determination had to be established through medical testimony. *Id.*

This case differs from Egbert in that Karen Meredith, a claims adjuster, is not going to testify as to whether the Plaintiff is injured or whether it is her opinion that the Plaintiff will need future medical procedures. According to her report, Meredith is only testifying as to the costs of two particular future medical procedures. As the Court stated in Egbert, Meredith is qualified, as a claims adjuster, to look at medical reports or a claim file and determine the costs of future medical procedures. Defendants' argument that because Meredith does not know who creates the



“CPT Codes,” which are given to medical procedures so that they can be billed and labeled, she is not qualified to testify as an expert is without merit. The fact that Meredith does not know who creates a five-digit code does not affect her ability to testify as a claims adjuster. Similarly, Defendants' argument that because Meredith cannot explain the technical procedures involved in the two knee surgeries she is not qualified is equally without merit. Meredith does not need to know how to perform a knee arthroplasty in order to testify as to what its standard cost is and how it is billed. Meredith is qualified to testify as an expert with regards to the information contained in her report.

Defendants also seek to prohibit expert testimony from Captain Parker Sheehan, a training and safety officer with the Boise Fire Department. Defendants argue that Sheehan's report exceeds the scope of his expertise as it makes conclusions regarding the physical mechanics of an automobile accident and relies on scientific analysis of speed, distance, acceleration, and response times. Sheehan does admit in his deposition that he doesn't know where the ambulance was situated, how fast it was moving, or whether there was sufficient time for the Plaintiff to move clear. The fact that Sheehan was not at the scene when the incident occurred does not prevent him from testifying as an expert. However, it appears that it may be appropriate to limit the sphere of testimony somewhat for Sheehan. See *Perry v. Magic Valley Regional Medical Center*, 134 Idaho 46, 54, 995 P.2d 816, 824 (2000) (finding that social worker was not qualified to testify as an expert on particular issue but was qualified to testify to another issue). Sheehan is not qualified to testify as to the cause of the accident, how fast the ambulance was moving, or whether the Plaintiff could have successfully gotten out of the way. It appears that based on Sheehan's training, his testimony will be limited to the training received by firefighters in backing techniques and whether it appears from the evidence Sheehan reviewed that the proper techniques were followed in this case.

#### *ii) Admissibility of Testimony*

After a witness is qualified as an expert, the court must determine if the expert opinion testimony will assist the trier of fact in understanding the evidence. *Hopkins*, 113 Idaho at 679-80, 747 P.2d at 89-90. If the testimony is competent and relevant, it may be admissible with the trier of fact weighing its credibility. *Id.* at 681, 90. An expert opinion that is speculative or unsubstantiated by the record is not admissible because it would not assist the trier of fact in understanding the evidence. *Swallow v. Emergency Medicine of Idaho, P.A.*, 138 Idaho 589, 592, 67 P.3d 68, 72 (2003). There must be a scientific basis for the expert's opinion and if the reasoning or methodology is not scientifically sound, the testimony is not admissible. *Id.*

It appears as though at least some of the information contained in Meredith's report, and what she plans to testify to at trial, is based on reasoning or methodology that may or may not be scientifically sound. Meredith's report contains the costs for two procedures: knee arthroplasty (procedure one) and patella femoral joint replacement (procedure two). The report also contains an estimate of time off of work following each procedure, as well as a “PPI rating,” or lower extremity impairment rating, for each procedure. In her deposition, Meredith states that her cost estimate and PPI rating for procedure one are based on two prior claims for the same procedure, but that she does not know what Ruffing's PPI rating would actually be. With respect to procedure two, Meredith stated that her cost estimate and PPI rating were guesses and that she obtained the figures from lowering them somewhat from procedure one.

However, at the hearing on November 18, 2009, Plaintiff's counsel stated that he could lay a sufficient foundation to allow Meredith to state that she had conducted these types of estimates many times in the past and that the estimates in her report are educated guesses based on her training and expertise. The Court will wait until trial when Meredith is on the stand to determine if counsel for Plaintiff has laid a sufficient foundation to allow Meredith to testify as to specifics of her report.

With respect to the testimony of Sheehan, as long as his testimony is limited to the backing procedures of the department and his opinion as to whether those procedures were followed, Sheehan's testimony is admissible. Sheehan has extensive training in safety procedures and stated in his deposition that if anyone in the department had a question regarding backing, he is who they would call. There is therefore a reliable basis for the opinion and the opinion will assist the jury in understanding the evidence.

## 2) PLAINTIFF'S MOTION TO ADD BOISE CITY AS A PARTY

Plaintiff filed a Motion to Add Boise City, pursuant to I.R.C.P. 17 and Idaho Code section 72-223, on August 4, 2009.<sup>[FN1]</sup> At issue in this motion is ultimately whether the City of Boise has any legal right to recover money it paid to the Plaintiff, over and above what it was required to pay under the Worker's Compensation Statute. The Plaintiff was paid his entire normal wages during his time off of work due to the injury. The City of Boise (the City) paid him two-thirds of his wage as required under the Worker's Compensation Statute, Idaho Code section 72-408. The City also paid the Plaintiff the remaining one-third of his usual salary (one-third payment) for the time he was off of work pursuant to a Collective Labor Agreement between the City and the Firefighter's Union (the Agreement), of which the Plaintiff belongs. The Plaintiff seeks to add the City as a named plaintiff in this action in order to ensure that the City can recover the one-third of Plaintiff's wages it paid.

FN1. The Plaintiff has not argued that the City must be added pursuant to I.R.C.P. 24( a) so the Court will not address that issue.

## ANALYSIS

The Court finds that it is not proper to add the City as a named party at this late stage before trial. Rule 17(a), which provides that "[e]very action shall be prosecuted in the name of the real party in interest," does not provide a ground to add the City as a party. This is a personal injury suit brought by Plaintiff Ruffing. Ruffing is the real party in interest. As Defendants have pointed out, adding the City as a named party could influence the jury by inferring liability on the part of Ada County based on the perception of the City suing Ada County. Additionally, with the trial set for December 7, 2009, adding the City as a named party could lead to discovery issues and complications, over and above the discovery issues that already plague this case.

The Plaintiff cites to Idaho Code section 72-223(2) in support of his argument that the City should be named as a plaintiff. Section 72-223(2) states: "Action may be instituted against such third party by the employee, or in the event compensation has been claimed and awarded, by the employee and employer jointly, in the employee's name, or, if the employee refuses to participate in such action, by the employer in the employee's name." Nothing in section 72-223(2) gives the City the right to join this action as a named party. It gives the City the right to institute an action against a third party, here Ada County, but only in the employee's name. This section in fact appears to contradict the Plaintiff's argument because it says that the City may only sue in the employee's name. The Court therefore denies the Plaintiff's Motion to Add Boise City as a Party. However, as discussed below, the decision not to add the City as a named party does not foreclose the ability of the City to recover its one-third payment.

The Court will first address the Defendants' argument that the Agreement is unconstitutional. The Defendants argue that because the term of the Agreement is from April 1, 2002, to March 31, 2006, it violates Article VIII, Section 3 of the Idaho Constitution. Article VIII, Section 3 prohibits a city from incurring any debt or liability beyond the fiscal year. Any indebtedness or liability incurred beyond a year is void, unless it is incurred as an ordinary and necessary expense authorized by the general laws of the state. IDAHO CONST. art. VIII § 3. There is no dispute that the Agreement obligates the City to a liability beyond a year. The issue therefore is whether the Agreement falls within the "ordinary and necessary" exception to Article VIII, Section 3.

There does not appear to be any Idaho case law directly addressing whether payment of wages for a work-related injury above that required by worker's compensation is an ordinary and necessary expense. However, there are cases that are analogous. The Idaho Supreme Court has held that employment contracts for city officers and employees for more than one year can be ordinary and necessary expenses. *Ray v. Nampa School District No. 131*, 120 Idaho 117, 120 182 P.2d 17, 20 (1991) citing *Butler v. Lewiston*, 11 Idaho 393, 83 P. 234 (1905). The court has also held that the establishment of a policeman's retirement fund was an ordinary and necessary expense because it was merely an

extension of the city's compensation scheme. *Id.* citing *Hanson v. City of Idaho Falls*, 92 Idaho 512, 446 P.2d 634 (1968). However, the general test, as recently articulated by the Idaho Supreme Court, is that an expense must be both ordinary and necessary. *City of Boise v. Frazier* 143 Idaho 1, 4, 137 P.3d 388, 391 (2006). An expense is ordinary "if in the ordinary course of municipal business ... it may be and is likely to become necessary. *Id.* (citation omitted). An expense is necessary if there exists "a necessity for making the expenditure at or during such a year." *Id.* at 5, 392.

The Defendants argue that the payment is not ordinary because it is not "salary" but really a bonus paid to injured firefighters. The Court is not persuaded by this argument. Here the city is paying the full salary to an injured firefighter. Based on the hazardous nature of the job, firefighters may often become injured and receive full salary payment under the agreement. The expense is ordinary as it becomes required in the ordinary course of municipal business to maintain experienced firefighters.

The Agreement also meets the necessity prong. If a firefighter is injured, there is a necessity that the City pays the firefighter the one-third amount during the year of the injury because that is when the firefighter is unable to work and requires the payment. The purpose of compensating the firefighter while he or she is unable to work would not be accomplished if the firefighter was not paid until a subsequent year; when he or she may then be able to work and earn his or her typical wage.

Finding that the Agreement is an ordinary and necessary expense is supported by the *Hanson* case, where the court found that a policeman's retirement fund was an ordinary and necessary expense because it was an extension of the city's compensation scheme. While this case does not involve a retirement fund, payment under the Agreement can be seen as merely an extension of the City's compensation scheme. Firefighters have a unique job with more risks and dangers than other positions. It is therefore logical that firefighters could receive additional compensation above that required by Worker's Compensation statutes. Compensation for work-related injuries is not the only area where firefighters receive special treatment. Under Idaho Code section 72-1401 through 1444 firemen receive special retirement benefits that other state or city employees do not receive. Under Idaho Code section 67-820, flags at government buildings are to be flown at half staff on the death of a firefighter who died in the line of duty.

The Court finds that payment under the Agreement is ordinary and necessary and therefore constitutional under Article VIII, Section 3 of the Idaho Constitution.

It must next be determined if the City has any legal right to recover payments it made to the Plaintiff pursuant to the Agreement. Both parties admit that there is no provision in the Agreement itself requiring the Plaintiff to pay back the City. The City must therefore attempt to recover under an equitable principal such as subrogation or indemnity.

The Plaintiff argues that the City has a subrogated right to all money it paid to the Plaintiff under Worker's Compensation, Idaho Code section 72-223(3). That section states: "[i]f compensation has been claimed and awarded, the employer having paid such compensation or having become liable therefore, shall be subrogated to the rights of the employee, to recover against such third party to the extent of the employer's compensation liability." Under section 72-223(3) the employer can subrogate to the employee's recovery against a third party and obtain a reimbursement of the worker's compensation benefits it paid. *Schneider v. Farmers Merchant, Inc.*, 106 Idaho 241, 244 (678 P.2d 33, 36 (1983)). It is clear that the City has a subrogated interest in the two-thirds of the Plaintiff's salary it paid pursuant to the Worker's Compensation laws. It is not clear, however, whether the City has a subrogated interest under section 72-223(3) in the one-third of the Plaintiff's salary it paid pursuant to the Agreement.

There does not appear to be any case law discussing whether benefits paid above those required by worker's compensation qualify for subrogation under section 72-223(3). The term "compensation," as used in section 72-223(3), is defined broadly to mean "any or all of the income benefits and the medical and related benefits and medical services." I.C. § 72-102(7). The phrase "any or all of the income benefits" could be interpreted to include the excess

money paid by the City pursuant to the Agreement. However, there are many detailed and specific statutes that govern worker's compensation and exactly how much to pay, when, and to whom. It does not appear that section 72-223(3) was intended to cover money paid above that required by Worker's Compensation. The Plaintiff therefore does not have a subrogated interest in the one-third payment made pursuant to the Agreement under section 72-223(3).

The Plaintiff will therefore have to rely on an equitable remedy. Both indemnity and subrogation are equitable principles that one compelled to pay damages caused by another can seek recovery from that party. May Trucking Co. v. International Harvester Co., 97 Idaho 319, 320, 543 P.2d 1159, 1160 (1975). The doctrine of equitable subrogation is the substitution of one person for another, so that he may succeed to the rights of the creditor in relation to the debt or claim. Williams v. Johnson, 92 Idaho 292, 298, 442 P.2d 178, 184 (1968) (internal citation omitted). Equitable subrogation allows the one who paid money on behalf of another to be substituted in place of the party the money was paid on behalf of, without any express agreement. May Trucking, 97 Idaho at 321, 543 P.2d at 1161. There is no general rule as to when the doctrine should apply; rather its application depends on the facts and circumstances of each case in order to serve the ends of justice. Williams, at 299, 185. The party seeking subrogation must have been under an obligation to make the payment. *Id.* A person that was merely a volunteer cannot invoke the aid of subrogation. *Id.*

In this case, the City paid the Plaintiff one-third of his usual salary during his time off of work. The City was contractually obligated to make that payment under the Agreement. It appears that it would serve the ends of justice to allow the City to subrogate and recover the money that it paid. This would also prevent the Plaintiff from receiving double recovery since he will not be allowed to keep the money damages as well as the compensation he was already paid. The City does not have to be a party to this litigation in order to recover the one-third payment made under the Agreement because it has an equitable right to be subrogated against any recovery the Plaintiff receives in this action. The City is also adequately represented in the case as counsel for Plaintiff is also representing the City. The Court finds that the City will have the right to recover its one-third payment through the doctrine of equitable subrogation and it is therefore not necessary to add the City as a party.

The doctrine of indemnity is not available to the City in this case because the statute of limitations has run. A primary distinction between the equitable doctrines of subrogation and indemnification is the effect each has on the statute of limitation. May Trucking, 97 Idaho at 321, 543 P.2d at 1161. A claim of subrogation is derivative and is subject to the same statute of limitation as though the action were sued on by the indemnitor. *Id.* The statute of limitation for an indemnity action, however, begins to run from the time of payment by the indemnitee. *Id.* at 322, 1162. This case is a personal injury lawsuit and therefore the statute of limitations to bring a claim is two years pursuant to Idaho Code section 5-219(4). The accident involving the Plaintiff occurred in 2004 and therefore the statute of limitations would have run in 2006. Plaintiff brought this action within the statute and therefore a claim for subrogation can still be brought because it is derivative and subject to the same statute of limitation. The statute of limitation for an indemnity action, however began to run with the City (indemnitee) paid the Plaintiff the one-third payment under the agreement. This occurred in 2004 or 2005, meaning that the statute of limitation had run at the latest in 2007. The City is therefore precluded from seeking repayment under the equitable doctrine of indemnity; however, it can recover under the equitable doctrine of subrogation through the plaintiff of having filed his claim within the statute of limitations..

#### CONCLUSION

Defendants' Motion to Exclude Evidence pursuant to Rule 407 and 409 is granted. The expert testimony of Karen Meredith and Captain Parker Sheehan is limited as stated herein. The Plaintiff's Motion to add the City as a party is denied. The City's interests are protected under the equitable doctrine of subrogation.

IT IS SO ORDERED

Dated this 20<sup>th</sup> day of November 2009

<<signature>>

Darla Williamson, District Judge

Ruffing v. Ada County Paramedics  
2009 WL 7366868 (Idaho Dist. ) (Trial Order )

END OF DOCUMENT

# Appendix B

**H**

Idaho District Court,  
Third Judicial District.  
Payette County


THE VANDERFORD COMPANY, INC., a Nevada corporation; and Primary Residential Mortgage, Inc., a Nevada corporation, fka Vanderford Center, Inc., Plaintiffs-Counterdefendants,  
v.

Paul KNUDSON, personally and Individually, Austin Homes, LLC., a Utah limited liability Company, J.r. Development, LLC A Utah limited liability Company, and John Does 1-20, Defendants;  
and The Pines Townhomes, LLC, an Idaho limited liability, Defendant-Counterclaimant,  
and Richard I. Greif and Jody Greif, Defendants-Counterclaimants.

No. CV-OC 01-7380\*D.

January 24, 2008.

West Headnotes

Parties 287  40(7)

#### 287 Parties

287IV New Parties and Change of Parties

287k37 Intervention

287k40 Persons Entitled to Intervene

287k40(7) k. Persons Primarily or Ultimately Liable. Most Cited Cases

Insurer for defendants-counterclaimants was not entitled to intervene in lawsuit, where insurer had no interest relating to the property or transaction that was the subject of the action. **Rules Civ.Proc., Rule 24.**

#### Memorandum Decision and Order Ion to Upon Motion to Intervene

Thomas J. Ryan, District Judge.

This matter came on for hearing on December 20, 2007 upon State Farm's Motion and Verified Petition for Leave to Intervene. Mr. Jeffrey A. Thomson presented oral argument on behalf of State Farm. Mr. Douglas J. Parry presented oral argument on behalf of the plaintiffs. Mr. William F. Lee presented oral argument on behalf of Paul Knudson. Mr. R. Brad Masingill presented oral argument on behalf of the Greifs.

The Court has reviewed the written briefs submitted on behalf of the parties and considered the oral arguments presented and finds as follows:

#### *PROCEDURAL HISTORY*

On July 13, 2007, the Supreme Court filed its Opinion in the above-entitled case remanding the case for a new trial. On August 17, 2007, State Farm filed its Motion and Verified Petition for Leave to Intervene. On September 17, 2007, the plaintiffs filed their Reply Memorandum in Opposition to State Farm's Motion for Leave to Intervene. On September 19, 2007, defendant Knudson filed his Memorandum concurring with Plaintiffs' opposition to State Farm's Motion.

#### *LAW*



**I.R.C.P. 24** provides:

*(a) Intervention of right.*

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the state of Idaho confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

*(b) Permissive intervention.*

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

*(c) Procedure.*

A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

The procedural decision to grant a motion to intervene is governed by **Rule 24 of the Idaho Rules of Civil Procedure**, and a trial court's decision to grant or deny a motion to intervene is a matter of discretion. Farrell v. Board of Com'rs, Lemhi County, 138 Idaho 378, 383, 64 P.3d 304 (2002).

Interpretation of the Idaho Rules of Civil Procedure is guided by the interpretation of the Federal Rules of Civil Procedure in federal cases. Chacon v. Sperry Corp., 111 Idaho 270, 275, 723 P.2d 814 (1986). Part of the reason for adopting the Federal Rules of Civil Procedure in Idaho, and interpreting our own rules adopted from the federal courts as uniformly as possible with the federal cases, was to establish a uniform practice and procedure in both the federal and state courts in the State of Idaho. *Id.*

To intervene as of right under Fed.R.Civ.P. 24(a)(2), the applicant must claim an interest relating to the property or transaction which is the subject of the action and that the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. U.S. v. Alisal Water Corp., 370 F.3d 915, 919 (9th Cir.2004).

In particular, an applicant for intervention as of right is required to demonstrate that (1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest. *Id.* The party seeking to intervene bears the burden of showing that all the requirements for intervention have been met. *Id.*

In determining whether intervention is appropriate, courts are guided primarily by practical and equitable considerations, and the requirements for intervention are broadly interpreted in favor of intervention. *Id.*

*Protectable Interest*

To trigger a right to intervene, however, an economic interest must be concrete and related to the underlying subject matter of the action. U.S. v. Alisal Water Corp., 370 F.3d 915, 919-920 (9th Cir.2004). Regardless of the phase of litigation at which an interest arises, that interest must be related to the underlying subject matter of the litigation. *Id.*

An applicant has a significant protectable interest in an action if (1) it asserts an interest that is protected under some law, and (2) there is a relationship between its legally protected interest and the plaintiffs claims. Southern California Edison Co. v. Lynch, 307 F.3d 794, 802-803 (9th Cir.2002). The relationship requirement is met if the resolution of the plaintiffs claims actually will affect the applicant. *Id.* The interest test is not a clear-cut or bright-line rule, because no specific legal or equitable interest need be established. *Id.* Instead, the interest test directs courts to make a practical, threshold inquiry, and is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process. *Id.*

#### *Adequacy of Representation*

There are three factors used in determining the adequacy of representation: (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect. Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir.2003). If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene. *Id.* The burden on proposed intervenors in showing inadequate representation is minimal, and would be satisfied if they could demonstrate that representation of their interests may be inadequate. *Id.*

The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties. *Id.* When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. *Id.* If the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation. *Id.*

#### *ANALYSIS*

State Farm argues that it insured and provided the Griefs a defense under an insurance policy and paid attorney fees and costs through trial and post judgment motions in the original trial in this matter. Following the trial and while the appeal was pending, State Farm and Richard Grief agreed that the judgment entered against the Griefs was not covered under the policy and that State Farm had no further duty to defend. State Farm was allowed to intervene in the appeal. The Idaho Supreme Court vacated the verdict and remanded the case for retrial. Therefore, the determination at trial that the Griefs were a prevailing party and the award of fees was also vacated. Because of this, State Farm argues it has an interest in the remanded case as it will determine whether the Griefs are the prevailing parties and are entitled to fees.

State Farm further asserts that the Griefs no longer have any interest in pursuing the issues relating to attorney fees and costs paid by State Farm in the first trial and on appeal. State Farm's rights in insuring that it recovers its costs for the Greifs' defense on the basis that the Greifs are the prevailing party would be adversely affected and justice will not be achieved without State Farm. State Farm also argues that it is not adequately represented by the existing parties as its interests are unique and more focused and the Griefs no longer have an interest in recovering the fees paid on their behalf. Lastly, State Farm points out that the Griefs have no objection to the intervening.

The Plaintiffs, with whom Knudson concurs, argue that State Farm does not meet the requirements of IRCP 24( a)( 2) and ( c) as State Farm does not claim an interest relating to the property or transaction which is the subject of the action. Specifically, the plaintiffs' argue: 1) State Farm does not claim an interest in the town homes or in the claims of breach of contract, fraudulent conveyance, breach of guarantee, etc., or in the Griefs' counterclaim against the Plaintiffs for breach of contract; 2) State Farm has no significant protectable interest in the property or transaction that will be impaired without its intervention; 3) the Griefs will adequately represent State Farm's interest in the outcome of the action as they seek to prevail on their claims which will allow for an award of attorney fees; 4) State Farm's motion is not accompanied by a pleading setting forth the claims or defense for which intervention is sought;

and, 5) its inclusion in the case would greatly multiply the incomprehensibility of the case.

The basic argument presented to the Court by State Farm is that the Griefs will not adequately protect its interest in attorneys fees paid by State Farm under a duty to defend provision contained in a contract of insurance between State Farm and the Griefs. Apparently, there were questions as to whether or not that insurance contract applied to the issues presented in this litigation. Ultimately, the parties to that insurance contract agreed that it did not relate to the issues in this litigation. That clarifies to this Court that State Farm has no "interest relating to the property or transaction which is the subject of the action". The issue of whether there was insurance coverage and a duty to defend has always been between the Griefs and State Farm and does not relate to the issues presented in the pleadings of this case. The Griefs have every incentive to prevail upon their claims in this litigation. If they do prevail, they will have a claim for attorneys' fees that will have to be addressed. At that time, if State Farm does not believe that the Griefs are adequately protecting their interest, State Farm can seek to intervene.

Therefore,

*ORDER*

IT IS HEREBY ORDERED, and this does ORDER, that State Farm's Motion to Intervene is DENIED.

Dated this 25th day of January, 2008.

<<signature>>

Thomas J. Ryan

District Judge

The Vanderford Co., Inc. v. Knudson  
2008 WL 4189006 (Idaho Dist. ) (Trial Order )

END OF DOCUMENT

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CARRIE BIRD  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2012 JUN 8 PM 2 54

CASE NO. CV2009-420  
BY LA DEPUTY

Attorneys for Applicant Swift Transportation Co., Inc.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,  
Plaintiff,

vs.

MALLORY E. LARSON,  
Defendant.

Case No. CV-2009-0420

**SWIFT TRANSPORTATION CO.,  
INC.'S REPLY IN SUPPORT OF  
MOTION TO INTERVENE**

Swift Transportation Company, transacting business as Swift Transportation Co., Inc. ("Swift") should be allowed to intervene in this matter. Swift is an interested party who has a protected interest in the outcome of this litigation. Despite its attempts to remain apprised of the status of the pending litigation between Mr. Tuerlings and Ms. Larson, Swift has essentially been left in the dark. As a result, Swift felt it had no other alternative than to file a motion and supporting documentation with this Court seeking to intervene to protect its interest.

**SWIFT TRANSPORTATION CO., INC.'S REPLY IN SUPPORT OF  
MOTION TO INTERVENE - 1**

Client:2488097.1

## I. ARGUMENT

Swift has moved this Court to intervene as a Plaintiff as a matter of right under Idaho Rule of Civil Procedure ("Rule") 24(a), or in the alternative under Rule 24(b), on the ground that it paid Teurlings' worker's compensation benefits and is thus entitled to be subrogated to Teurlings' recovery against Defendant, Mallory E. Larson. Under either Rule 24(a) or Rule 24(b), Swift has satisfied the procedural requirements entitling it to intervene.

**A. Swift Is Entitled to Intervene Pursuant to Idaho Rule of Civil Procedure 24(a) as a Matter of Right Because Swift's Interests Are Not Being Adequately Protected.**

A motion to intervene as a matter of right should not be dismissed unless it appears to a certainty that the intervenor is not entitled to relief under any set of facts that could be provided. *Willis v. Firestone Bldg. Products Co.*, 231 F.R.D. 447, 449 (D. Conn. 2005), citing *Relch v. ABC/York-Estate Corp.*, 64 F.3d 316, 321 (7th Cir. 1995). Here, the Court can grant Swift's motion to intervene as a matter of right in one of two ways: (1) where an Idaho statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest. IDAHO CODE § 24(a).

**1. Idaho Code Section 72-223 grants Swift the right to participate.**

Rule 24(a) permits intervention as a matter of right when the applicant claims an interest relating to the transaction at issue and the applicant's ability to protect that interest may be impaired by the disposition. *City of Boise v. Ada County*, 147 Idaho 794, 803, 215 P.3d 514, 523 (2009) (internal citations omitted).

Courts have the inherent power to grant intervention to persons who may be adversely affected by the outcome of a proceeding or when equitable principles otherwise require. See 67A C.J.S. Parties 93 (2009). It is generally recognized that “courts [should] look with favor on intervention in a proper case, and . . . be liberal in permitting parties to intervene under the proper circumstances.” *Id.* If there is any doubt as to whether intervention is appropriate, a motion to intervene should usually be granted. *Id.* These principles hold true in various forms of proceedings, not just those involving the litigation of claims between adverse parties.

*Id.*

According to both the Idaho Rules of Civil Procedure, and its counterpart, the Federal Rules of Civil Procedure, the Court has discretion to permit intervention. In determining whether intervention is appropriate, courts are guided primarily by practical and equitable considerations, and the requirements for intervention are broadly construed in favor of intervention. *The Vanford Co., Inc. v. Knudson*, 2008 WL 4189006 (Idaho 2008), citing *U.S. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004).

As articulated by the Ninth Circuit, “courts have long recognized a right of subrogation to the extent of payments made, and have permitted the employer or its insurer to intervene in the employee’s suit to protect its right,” *even where the compensation was paid without the entry of a formal compensation award. Dodge v. Mitsui Shintaku Ginko k. Tokyo*, 528 F.2d 669 (9th Cir. 1975), citing *Allen v. Texaco, Inc.*, 510 F.2d 977, 979-80 (5th Cir. 1975) (emphasis added), *in accord, Louviere v. Shell Oil Co.*, 509 F.2d 278, 283-84 (5th Cir. 1975); *Fontana v. Pennsylvania R. R.*, 106 F. Supp. 461, 462-63 (S.D.N.Y. 1952), *aff’d sub nom.*, *Fontana v. Grace Line, Inc.*, 205 F.2d 151 (2d Cir.), *cert. denied*, 346 U.S. 866, 74 S. Ct. 137, 98 L. Ed. 390 (1953).

Despite Defendant's contention, "[a] party seeking to intervene need not have an independent cause of action to be considered to have an interest within the scope of Rule 24(a)." *Willits*, 231 F.R.D. at 449, citing *Trobortch v. United Mine Workers of Am.*, 404 U.S. 528, 530, 92 S. Ct. 630, 30 L. Ed. 2d 686 (1972); *Forest Conserv. Council v. United States Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1995). Moreover, courts have recognized that an employer's right to subrogation pursuant to a statutory right to reimbursement confers on an employer a right to intervene. *Id.*, citing *Camley v. Ald Hosps., Inc.* 975 F. Supp. 252, 257 (W.D.N.Y. 1997) (holding workers compensation board had established a property right entitling it to intervene because it had paid over \$46,000 for wages and medical expenses.)

In *Willits*, the court held that an employer who paid worker's compensation benefits to its employee, a semitruck driver, was entitled to intervene in a third party action. Specifically, the court concluded that the statutory right to reimbursement conferred a property right on the employer. *Id.*, attached hereto as Exhibit A. Here, Idaho Code Section 72-223 contemplates that an employee and employer may pursue a third party action, in the employee's name. IDAHO CODE § 72-223. The statute makes clear that the employer can subrogate to the employee's recovery against a third party and obtain a reimbursement of the worker's compensation benefits it has paid. *Ruffing*, 2009 WL 7366868 at \*6, citing *Schneider v. Farmers Merchant, Inc.*, 106 Idaho 241, 244, 678 P.2d 33, 36 (1983); IDAHO CODE § 72-223(3). Here, Swift is seeking to intervene in order to enforce its statutory right. As such, this Court should grant Swift's motion to intervene.

**2. Swift's interests are not adequately protected.**

Alternatively, this Court should grant Swift's motion to intervene as a matter of right because Swift has a protectable interest that is not being adequately represented. Despite

Defendant's contentions that "Swift has failed to demonstrate that its interest is not being adequately protected," the fact remains that although Swift made several attempts to remain apprised of the status of the underlying proceeding and any discussion regarding negotiation, Swift has been left in the dark, having to resort to checking the court repository to stay abreast of the case. Swift was not privy to any conversations between Defendant's and Plaintiff's counsel. See Affidavit of Sonyalee R. Nutsch, ¶ 3. Rather, despite its inquiries, the parties have been nonresponsive as to the status of the case.

As demonstrated in *Willis*, and the cases cited therein, Swift's right to subrogation is a protectable interest. *Id.*, 231 F.R.D. at 449 ; *see also The Vanford Co., Inc.*, 2008 WL 4189006 at 2. As articulated in *Vanderford*:

If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene. *Id.* The burden on proposed intervenors in showing inadequate representation is minimal and would be satisfied if they could demonstrate that representation of their interests may be inadequate.

*Id.* Additionally, despite Defendant's contentions, Swift's and Teurlings' interests are not the same. Although both have an interest in maximizing recovery, they do not have identical interests because each competes for a portion of the fixed recovery. *Willis* at 450.

Here, Swift has an interest in participating in any proceeding, but especially a proceeding where the Defendant is seeking to dismiss all claims. Such a proceeding would impair Swift's protectable interest.

### 3. The Idaho cases cited by Defendant are distinguishable.

Defendant cites two Idaho cases as the basis for the authority that Swift is not entitled to intervene: *Ruffing v. Ada County*, 2009 WL 7366868 (Idaho 2009), and *The Vanford*



*Co., Inc. v. Knudson*, 2008 WL 4189006 (Idaho 2008). These cases are factually distinguishable from the present case. First, *Ruffing* concerned whether plaintiff could add Boise City as a plaintiff pursuant to Idaho Rule of Civil Procedure 17. The court held that because Idaho Code Section 72-223(2) only permits an employer to sue on behalf of an employee, the employer is not a proper party in interest for purposes of Idaho Rule of Civil Procedure 17, which requires that every action shall be prosecuted in the name of the real party in interest. *Ruffing* did not concern an application by the city to intervene. Rather, as articulated by the court, “[t]he Plaintiff has not argued that the City must be added pursuant to I.R.C.P.24(a) so the Court will not address the issue.” *Id.*

Secondly, Defendant relies on *Vanford*. The applicant seeking intervention in *Vanford* was the insurer, State Farm. State Farm was the party paying for the insured’s defense in the original state court action. *Id.* After a judgment was awarded against the insured, State Farm was permitted to intervene in the appeal. *Id.* It was only after State Farm and the insured determined that the claims asserted against the insured were not covered under the policy, and that State Farm had no further duty to defend, did the court determine that State Farm no longer had a right to intervene. Specifically, State Farm was only claiming the right to recover attorney fees relating to the original state action. As such, State Farm did not claim an interest relating to the property or transaction that was the subject of the action. Unlike the present case, State Farm had no interest in a potential award of damages. Further, the court in *Vanderford* did not entirely foreclose State Farm’s right to intervene but rather provided that should its insured prevail, then, at that time “if State Farm does not believe that the [insured] is adequately protecting their interest, State Farm can seek to intervene.” *Id.*

Neither *Ruffing* nor *Vanderford* stand for the proposition that an employer who has paid worker's compensation benefits, thus becoming subrogated to recovery of the employee, is precluded from intervening.

**B. Alternatively Swift Should be Entitled to Intervene Pursuant to I.R.C.P. 24(b).**

Idaho Rule of Civil Procedure grants a party permissive intervention if either (1) a statute confers a conditional right to intervene, or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. IDAHO R. CIV. P. 24(b). Even if this Court determines that Swift is not entitled to intervene as a matter of right, the Court should find that Swift has a permissive right to intervene.

The same statute that confers a right for Swift to participate, also serves as the basis for permissive intervention. That statute contemplates that an employer on its own, or with an employee, can participate in a third party suit against a tortfeasor.

Second, as articulated herein, Swift has a claim to an ultimate award of damages as a result of this lawsuit. Despite Defendant's contentions to the contrary, permitting Swift to intervene will not cause undue prejudice or delay. The same statute providing Swift a right to subrogation also contemplates that Swift and Teurlings can sue a third-party tortfeasor together to pursue recovery. IDAHO CODE § 72-223. Pursuant to the Idaho Rules of Civil Procedure and supporting case law, if allowed to intervene, Swift must take the case as it finds it at the time of intervention. Swift is not asserting any additional theories of negligence. Whether or not this Court permits Swift to intervene, Defendant will have to defend a negligence action brought by Plaintiff. Rather, in this case, it is Swift, as opposed to Defendant, who will be prejudiced should this Court deny Swift the opportunity to intervene. Swift has a claim for damages that will be

impaired should Defendant succeed in its efforts to dismiss. As articulated in *Willis*, an employer's and employee's rights are not the same. Specifically, although both have an interest in maximizing recovery, they do not have identical interests because each competes for a portion of a fixed recovery. *Willis* at 450.

**C. Pleading Setting Forth Claim or Defense.**

Swift properly served the parties with its memorandum in support of its motion to intervene, wherein it identified that it is only claiming a right to be subrogated to Plaintiff's recovery. Defendant is correct that Swift is not asserting any new causes of action or defenses. This is because an intervenor must take a case as he or she finds it. Moreover, Swift was never provided a copy of either the Complaint or Answer. If it would better serve the parties and this Court, attached hereto is a proposed pleading setting forth Swift's claim that it be subrogated in accordance with statutory authority.

**II. CONCLUSION**

In order to adequately protect its right to subrogation and to remain apprised of the status of this case, including the right to participate to protect that interest, Swift respectfully requests that this Court grant its Motion to Intervene.

DATED this 8<sup>th</sup> day of June, 2012.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By

Andrea J. Rosholt – Of the Firm  
Attorneys for Applicant  
Swift Transportation Company

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 8<sup>th</sup> day of June, 2012, I caused a true and correct copy of the foregoing **SWIFT TRANSPORTATION CO., INC.'S REPLY IN SUPPORT OF MOTION TO INTERVENE** to be served by the method indicated below, and addressed to the following:

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☐ Overnight Mail  
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☐ Hand Delivered  
☐ Overnight Mail  
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Andrea J. Rosholt

# **EXHIBIT A**

**Loislaw Federal District Court  
Opinions**

**WILLIS v. FIRESTONE BUILDING PRODUCTS CO. (D.Conn. 10-19-2005)**

231 F.R.D. 447

**David WILLIS and Kathy Willis, Plaintiffs, v. FIRESTONE BUILDING PRODUCTS  
CO., Defendant.**

No. CIV. 3:05CV43 (JBA).

United States District Court, D. Connecticut.

October 19, 2005

West Page 448

Alan M. Barry, Gregory P. Klein, Alan Barry & Assoc., Danbury, CT, for Plaintiffs.

Matthew Feigenbaum, Cohn, Birnbaum & Shea, Westport, CT, for Defendant.

***RULING ON MOTION TO INTERVENE [DOC. # 15]***

JANET ARTERTON, District Judge

In his complaint, plaintiff David Willis alleges he is a truck driver for Melton Truck Lines, Inc., ("Melton") and that in the course of his employment he was injured due to defendant's negligence. Employer Melton now moves to intervene as a plaintiff as a matter of right under Fed.R.Civ.P. 24(a), or, in the alternative, permissively under Fed.R.Civ.P. 24(b), on the grounds that it paid Willis benefits under the Oklahoma Worker's Compensation Act related to the injuries claimed in this case, and is entitled to a portion of any recovery in Willis' favor. *See* Motion to Intervene [Doc. # 15]. Melton additionally argues that its interests are not sufficiently represented by Willis, notwithstanding the fact that both share an interest in recovery from Firestone, because the Willises have an interest in keeping as large as possible a share of any recovery for themselves and, by implication, an interest in minimizing Melton's reimbursement share. Melton represents that no delay will result from its intervention because the only additional step necessary is for Melton to be served with all the papers in this case.

Firestone opposes Melton's motion to intervene, *see* [Doc. # 16] on the grounds that Melton's interests are adequately represented by the Willises, and that Melton has not shown that its intervention will not unduly delay or prejudice the original parties.

## I. STANDARD

Rule 24(a) provides for intervention of right upon a timely filed motion "(1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed.R.Civ.P. 24(a). As stated by the Second Circuit, "[t]o intervene as of right, a movant must (1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action." *Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123, 128-29 (2001) (internal quotation marks and citation omitted). Under the second prong of the test, for "an interest to be cognizable . . . it must be direct, substantial, and legally protectable. An interest that is remote from the subject matter of the proceeding, or that is contingent

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upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule." *United States v. Peoples Benefit Life Ins. Co.*, 271 F.3d 411, 415 (2d Cir. 2001) (internal quotation marks and citations omitted); see also *Restor-A-Dent Dental Labs., Inc. v. Cert. Alloy Prods., Inc.*, 725 F.2d 871, 874 (2d Cir. 1984). A party seeking to intervene, however, need not have an independent cause of action to be considered to have an interest within the scope of Rule 24(a). *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 530, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972); *Forest Conserv. Council v. United States Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1995) ("Whether an applicant for intervention demonstrates sufficient interest in an action is a practical, threshold inquiry. No specific legal or equitable interest need be established.") (internal quotation marks and citations omitted). The party must show only an interest within the context of the case, and, as required by the third prong of the test, demonstrate that its interest may be impaired by an adverse decision in the case. *Brennan*, 260 F.3d at 132. Under the fourth prong, representation by an existing party is determined to be adequate only if the party's "interests [are] so similar to those of [the intervenor] that adequacy of representation [is] assured." *Id.* at 133 (emphasis added).

"When considering a motion to intervene, the court 'must accept as true the non-conclusory allegations of the motion.'" *Bay Casino, LLC v. M/V Royal Empress*, 199 F.R.D. 464, 466 (E.D.N.Y. 1999) (quoting *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995)). "A motion to intervene as a matter of right, moreover, should not be dismissed unless it appears to a certainty that the intervenor is not entitled to relief under any set of facts which could be proved under the complaint. Each intervention case is highly fact specific and tends to resist comparison to prior cases." *Id.* (internal citations and quotation marks omitted).

## II. DISCUSSION

Melton's property claim, stemming from a state statutory right to reimbursement under Oklahoma worker's compensation law, is the basis for its claimed right to intervene under Rule 24(a)(2). The statute provides:

If [a worker] elects to take compensation under the Workers' Compensation Act, the cause of action against [a third party] shall be assigned to the insurance carrier liable for the payment of such

compensation, and if [the worker] elects to proceed against such other person . . . the employer's insurance carrier shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided . . . by the Worker's Compensation Act for such case. . . . Whenever recovery against [a third party] is effected without compromise settlement by the employee or his representatives, the employer or insurance company having paid compensation under the Workers' Compensation Act shall be entitled to reimbursement . . . and shall pay from its share of said reimbursement a proportionate share of the expenses, including attorneys fees, incurred in effecting said recovery to be determined by the ratio that the amount of compensation paid by the employer bears to the amount of the recovery effected by the employee. After the expenses and attorneys fees have been paid, the balance of the recovery shall be apportioned between the employer or insurance company having paid the compensation and the employee and or his representatives in the same ratio that the amount of compensation paid by the employer bears to the total amount recovered. . . .

Okla. Stat. tit. 85, § 44(a).<sup>[fn1]</sup>

The court in *Carnley v. Aid to Hospitals, Inc.*, 975 F.Supp. 252, 257 (W.D.N.Y. 1997), was faced with a situation similar to the present case. An employee sued the third party on whose premises he had been injured and the worker's compensation board moved

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to intervene. The court held that the worker's compensation fund had established a property right entitling it to intervene because it had paid the employee over \$46,000 for wages and medical expenses, which the plaintiff also sought to recover from the third party business owner. The court held that while the worker's compensation board was not required to intervene to protect its right to recover part of any award received by the employee, it did have a right to intervene "to protect its interest." *Id.* The court further held that the board was "in a much better position to protect [its] interest than any of the other parties." *Id.*

Here, defendant does not dispute that under the Oklahoma Worker's Compensation Act Melton has a right to an apportioned part of any recovery David Willis receives. Rather, defendant argues that Melton has failed to show that its interests are not adequately protected by the Willis. Under *Brennan*, representation by an existing party is determined to be adequate only if the party's "interests [are] so similar to those of [the intervenor] that adequacy of representation [is] assured." *Brennan*, 260 F.3d at 133 (emphasis added). As the court held in *Carnley*, the interests of an employee and a worker's compensation board are distinct. The same reasoning applies to an employee and his employer. While Melton and Willis both have an interest in maximizing recovery, they do not have identical interests, because each competes for a portion of a fixed recovery amount.

For this reason, Melton is entitled to intervene as a matter of right under Fed.R.Civ.P. 24(a)(2).

### III. CONCLUSION

Accordingly, Melton's Motion to Intervene [Doc. # 15] is GRANTED and the Clerk is directed to docket Melton's Intervening Complaint. The schedule ordered in this case [Doc. # 10] remains unchanged in light of Melton's representation that its intervention will cause no delay.

IT IS SO ORDERED.



[fn1] Melton also argues this issue under Connecticut's worker's compensation law, though under Connecticut choice-of-law principles, matters of worker's compensation are governed by the law of the state where the benefits were paid. *See Snyder v. Seldin*, 81 Conn.App. 718, 724, 841 A.2d 701, 705 (2004). Therefore Oklahoma law applies to the issue of whether Melton is entitled to indemnification from Mr. Willis.

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Attorneys for Applicant Swift Transportation Co., Inc.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS, and SWIFT  
TRANSPORTATION CO., INC.

Plaintiff,

vs.

MALLORY E. LARSON,

Defendant.

Case No. CV-2009-0420

**PROPOSED COMPLAINT OF  
APPLICANT SWIFT  
TRANSPORTATION CO., INC.**

COMES NOW the above-named plaintiff, Swift Transportation Company, Inc., transacting business under the name Swift Transportation Co., Inc. ("Swift"), by and through its undersigned counsel of record, Moffatt, Thomas, Barrett, Rock, & Fields, Chartered, and pursuant to Idaho Rule of Civil Procedure 24(c) hereby asserts its claim for subrogation.

**PROPOSED COMPLAINT OF APPLICANT SWIFT  
TRANSPORTATION CO., INC. - 1**

Client:2461357.1

### **JURISDICTION AND VENUE**

1. Swift Transportation Co., Inc., is a corporation duly organized under the laws of the state of Arizona.
2. Swift submits to the jurisdiction and venue as articulated in Plaintiff William Teurlings' ("Teurlings") Complaint as answered by Defendant Mallory Martinez fka Larson ("Defendant").

### **FACTUAL ALLEGATION**

3. On January 7, 2007, while employed for Swift as a semitruck driver, Teurlings was involved in a motor vehicle accident with Defendant.
4. Subsequently, Teurlings filed a claim for worker's compensation with Swift. Swift, by and through its surety, paid Teurlings' worker's compensation benefits.
5. On April 23, 2008, Swift, by and through its surety, entered into a Compromise and Release Agreement with Teurlings to settle his worker's compensation agreement for a sum certain.
6. As a result, Swift became entitled to be subrogated to Teurlings' recovery from Defendant pursuant to Idaho Code Section 72-223(3).
7. Upon information and belief, Teurlings filed a third-party action against Defendant seeking to recover damages based on a theory of negligence.

#### **I. CLAIM FOR SUBROGATION**

8. Swift realleges and incorporates herein by reference paragraphs 1 - 7 of this Complaint, and additionally complains and alleges as follows:
9. Pursuant to Idaho Code Section 72-223, Swift has a subrogated right to all money it paid to Teurlings pursuant to Teurlings' worker's compensation claims.

10. To the extent Teurlings succeeds in prosecuting his claims against Defendant, Swift is entitled to subrogation of the damages or settlement proceeds awarded to Teurlings.

**PRAYER FOR RELIEF**

WHEREFORE, Swift prays for judgment in its favor as follows:

1. That the Court declare Swift to have a valid and enforceable right to subrogation of the proceeds of any judgment or settlement that is the result of a cause of action, suit, claim, counterclaim, or demand accruing to Defendant on account of injuries giving rise to such a cause of action, claim, counterclaim, or demand;

2. That the release of a cause of action, suit, claim, counterclaim, or demand accruing to Teurlings or to the legal representative(s) of Teurlings be declared ineffective as against Swift unless and until the full amounts owing to Swift by Defendant, including all interest which has accrued on her account with Swift, have been paid in full;

3. For costs, filing fees, and recording fees; and

4. For such other relief as the Court deems just.

DATED this \_\_\_\_ day of June, 2012.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By \_\_\_\_\_  
Andrea J. Rosholt- Of the Firm  
Attorneys for Applicant Swift  
Transportation Company

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this \_\_\_\_ day of June, 2012, I caused a true and correct copy of the foregoing **PROPOSED COMPLAINT OF APPLICANT SWIFT TRANSPORTATION CO., INC** to be served by the method indicated below, and addressed to the following:

Sonyalee R. Nutsch  
CLEMENTS BROWN & McNICHOLS, PA  
321 13th St.  
P.O. Box 1510  
Lewiston, ID 83501-1510  
Facsimile (208) 743-9295  
*Attorneys for Defendant*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile

Ned A. Cannon  
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*Attorneys for Plaintiff*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile

---

Andrea J. Rosholt

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

COURT MINUTES

Presiding Judge  
CARL B. KERRICK  
Reporter  
NANCY TOWLER  
Date JUNE 12, 2012  
Time: 9:05 A.M.

WILLIAM P. TEURLINGS,

Plaintiff,

vs.

MALLORY E. LARSON,

Defendant.

)  
)  
) Docket No. CV-09-420  
)  
) APPEARANCES:  
)  
) NED CANNON  
) For, Plaintiff  
) SONYALEE NUTSCH  
) For, Defendant  
) ANDREA ROSHOLT  
) For, Swift Transportation

SUBJECT OF PROCEEDINGS: MOTION FOR SUMMARY JUDGMENT /  
MOTION TO INTERVENE / MOTION TO STRIKE  
BE IT KNOWN, THAT THE FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:  
COURTROOM #1

90531 Ned Cannon present. Sonyalee Nutsch present. Andrea Rosholt on telephone.  
Court addresses counsel.

90656 Ms. Rosholt presents argument re: motion to intervene.

91004 Ms. Nutsch presents argument re: opposition to motion to intervene.

92112 Ms. Rosholt presents rebuttal argument re: motion to intervene.

92447 Ms. Nutsch presents argument re: motion for summary jdmt and motion to strike.

93624 Mr. Cannon presents argument re: motion for summary jdmt and motion to strike.

94453 Ms. Nutsch presents rebuttal argument.

94714 Court addresses Ms. Nutsch.

94813 Mr. Nutsch responds.

94846 Court takes the matter under advisement and will issue a written decision.


94922 Recess

JENNY LANDRUS

Deputy Clerk

1 Page of 1 Pages

APPROVED:

  
Presiding Judge

COURT MINUTES JUNE 12, 2012

FILED July 13, 2012 1:30 P.M. LEWISTON, IDAHO  
BY C.B. Kerrick  
CARL B. KERRICK

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendant.

CASE NO. CV2009-420

MEMORANDUM OPINION  
AND ORDER ON  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT AND  
SWIFT TRANSPORTATION  
COMPANY'S MOTION TO  
INTERVENE

This matter came before the Court on the Defendant's Motion for Summary Judgment and Swift Transportation Company's Motion to Intervene. The Plaintiff was represented by Ned Cannon, of the firm Smith and Cannon. The Defendant was represented by Sonyalee Nutsch, of the firm Clements, Brown & McNichols. Swift Transportation Co. was represented by Andrea Rosholt, of the firm Moffatt, Thomas, Barrett, Rock & Fields. The Court heard oral argument on June 12, 2012. The Court, having heard the argument of counsel and being fully advised in the matter, hereby renders its decision.

## BACKGROUND

On January 7, 2007, at about 12:43 p.m., Mallory Martinez<sup>1</sup> was involved in a traffic accident with the plaintiff William Teurlings, a truck driver for Swift Transportation Company (Swift). *Plaintiff's Memorandum in Opposition to Summary Judgment*, at 1. Martinez is a member of the Idaho Army National Guard, 145<sup>th</sup> HHC Support Battalion. *Defendant's Memorandum in Support of Summary Judgment*, at 2. As a National Guard member, Martinez is required to attend instructional drills once a month. *Id.* On January 7, 2007, Martinez was returning to her home in Boise, Idaho from Lewiston, Idaho where one of these instructional drills took place. *Id.* On her return to Boise Martinez was involved in the accident with Teurlings. She was driving her private vehicle and providing transportation to a fellow guardsman who also lived in Boise. *Id.*

For purposes of the instructional drills, Martinez's commanding officers was Section Sergeant Tony Rice. *Id.* According to the affidavit provided by SSG Rice, each guardsman, including Martinez, was on duty from 12:00 a.m. on January 6, 2007 until 11:59 p.m. on January 7, 2007. Rice Aff. ¶ 5. SSG Rice avers he instructed Martinez to provide transportation to and from the training to the guardsman that was with her at the time of the accident. Rice Aff. ¶ 6. After the accident, Martinez informed SSG Rice of what had happened, and a Line of Duty Report of Investigation was completed. Rice Aff. ¶ 6. The Guard, finding Martinez was on duty at the time of the accident, paid her medical bills. Rice Aff. ¶ 7.

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<sup>1</sup> At the time of the accident, the Defendant was named as Mallory E. Larson. In the interim between filing suit and the motions currently before the Court, the Defendant has married, and thus, is now known as Mallory E. Martinez. For purposes of this document, the Defendant will be referred to by her currently known surname, Martinez.



Teurlings filed this negligence action against Martinez on January 6, 2009.<sup>2</sup> Martinez filed a motion for summary judgment relying on I.C. § 6-904(4) which allows an exception to liability for Idaho National Guard members engaged in training or duty. Teurlings contends Martinez was not within the course and scope of her employment with the Guard at the time of the accident and is therefore not protected by I.C. § 6-904(4) from liability should she be determined to have acted negligently in causing the collision.

On May 25, 2012, Swift filed a motion to intervene in this action pursuant to I.R.C.P. 24. These motions, as well as a motion to strike filed by the plaintiff, are currently pending before the Court.

#### **SUMMARY JUDGMENT STANDARD**

Summary judgment should be granted where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether summary judgment is appropriate, the court must construe the pleadings, depositions, admissions, and affidavits in a light most favorable to the nonmoving party. *Ruffing v. Ada County Paramedics*, 145 Idaho 943, 945, 188 P.3d 885, 887 (2008); *Conway v. Sonntag*, 141 Idaho 144, 146, 106 P.3d 470, 472 (2005), *citing Infanger v. City of Salmon*, 137 Idaho 45, 44 P.3d 1100 (2002).

When a motion for summary judgment is “supported by a particularized affidavit, the opposing party may not rest upon bare allegations or denials in his pleadings,” but must set forth “specific facts” showing a genuine issue. I.R.C.P. 56(e); *Verbillis v.*

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<sup>2</sup> Mr. Teurlings received worker’s compensation from Swift in the amount of fifty five thousand dollars for injuries he sustained in the accident. *See Swift’s Memorandum in Support of Motion to Intervene*, at 2.

*Dependable Appliance Co.*, 107 Idaho 335, 337, 689 P.2d 227, 229 (Ct. App. 1984). A “mere scintilla” of evidence or only a “slight doubt” as to the facts is insufficient to withstand summary judgment. *Finholt v. Cresto*, 143 Idaho 894, 896, 155 P.3d 695, 697 (2007); *see also Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238, 108 P.3d 380, 385 (2005).

Finally, the initial burden of establishing the absence of a genuine issue of material fact is on the moving party, and once this burden is met, it is incumbent upon the non-moving party to establish an issue of fact regarding that element. *Meikle v. Watson*, 138 Idaho 680, 683, 69 P.3d 100, 103 (2003); *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996).

## ANALYSIS

There are three motions currently pending before the Court: Defendant Martinez’s motion for summary judgment; Plaintiff Teurlings’ motion to strike the affidavits of Martinez and Rice,<sup>3</sup> and Swift’s motion to intervene. The motion for summary judgment shall be addressed first.

### 1. Motion for Summary Judgment

Martinez claims summary judgment is appropriate pursuant to I.C. § 6-904(4). This section falls under the Idaho Tort Claims Act (hereinafter “ITCA”) as an exception to liability for individuals participating in activities of the Idaho National Guard when engaged in training or duty. Teurlings contends first that there is a material question of

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<sup>3</sup> Teurlings seeks to have attachments to the affidavits of Rice and Martinez stricken based on the argument that the records attached are inadmissible hearsay. The records would fall into an exception to the hearsay rule, I.R.E. 803(8). Regardless, the Court would reach the conclusion herein even if the attached record was stricken. Further, Teurlings contends that Martinez and Rice each make statements which are legal conclusions. The motion to strike is denied on this basis, as the Court finds the affiants are testifying as to facts they have personal knowledge about.

fact as to whether Martinez was on duty. Second, Teurlings argues that Martinez is not considered on duty, or within the course and scope of her employment with the Idaho National Guard, based upon the coming-and going rule. Each argument will be addressed individually.

**a. Whether Martinez was on duty with the Idaho National Guard.**

Martinez claims she is immune from liability pursuant to I.C. § 6-904(4), which sets forth an exception to liability for individuals who are on duty for the Idaho National Guard when a negligent act occurred. I.C. § 6-904(4) is contained within the ITCA, which “abrogates the doctrine of sovereign immunity and renders a governmental entity liable for damages arising out of its negligent acts or omissions.” *Lawton v. City of Pocatello*, 126 Idaho 454, 458, 886 P.2d 330, 334 (1994). “The purpose of the ITCA is to provide ‘much needed relief to those suffering injury from the negligence of government employees.’ The ITCA is to be construed liberally, consistent with its purpose, and with a view to ‘attaining substantial justice.’” *Rees v. State, Dept. of Health and Welfare*, 143 Idaho 10, 19, 137 P.3d 397, 406 (2006) (internal citations omitted).

I.C. § 6-904 generally sets forth several exceptions to liability. I.C. § 6-904(4) pertains to activities of the Idaho National Guard:

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

...

4. Arises out of the activities of the Idaho national guard when engaged in training or duty under sections 316, 502, 503, 504, 505 or 709, title 32, United States Code.

*Id.* Martinez was participating in training exercises pursuant to 32 U.S.C. § 502.

(a) Under regulations to be prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, each company, battery, squadron, and detachment of the National Guard, unless excused by the Secretary concerned, shall—

(1) assemble for drill and instruction, including indoor target practice, at least 48 times each year; and

(2) participate in training at encampments, maneuvers, outdoor target practice, or other exercises, at least 15 days each year.

32 U.S.C. § 502(a)(1-2).

Martinez states she was on duty with the Idaho National Guard and attending a regularly scheduled instruction drill in Lewiston, Idaho, on the day the accident occurred.

*Affidavit of Mallory E. Martinez.* Martinez's supervisor, SSG Rice, attested that Martinez was attending drill pursuant to 32 U.S.C. § 502. *Affidavit of SSG Tony Rice*, at 2. He further stated he ordered Martinez to provide transportation to a fellow guardsman, and thus, Martinez was following orders at the time she was in the collision. SSG Rice described the time on duty and his orders to Martinez<sup>4</sup> as follows:

5. January 7, 2007, was the final day of the 145<sup>th</sup>'s regularly scheduled drill instructions in Lewiston, Idaho and SPC Mallory Larson was in attendance. SPC Larson was on duty from 12:00 a.m. on January 6, 2007 to 11:59 p.m. on January 7, 2007.

6. I was aware that SPC Larson lived in Boise, Idaho and another guardsman who was also a member of the 145<sup>th</sup> lived in that area as well. I instructed SPC Larson to provide transportation for her fellow guardsman to and from the drill that was completed on January 7, 2007. I understood that she had complied with my order.

*Id.*

The central issue in this case is whether Martinez was on duty when the collision occurred, while she was traveling home after participating in drill activities. According to Martinez and her supervising officer, she was on duty until 11:59 p.m. on January 7,

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<sup>4</sup> Within the affidavit, SSG Rice refers to the Defendant by her maiden name, Mallory Larson.

2007. Teurlings questions whether Martinez was on duty based on the following facts: Martinez was not reimbursed for mileage; Martinez was not ordered by the National Guard to travel home via a specific route; Martinez drove her own personal vehicle; training only occurred once a month and Martinez's training status did not equal full-time duty; Martinez was not hired by the National Guard to drive or transport other guardsmen; and Martinez was not driving between assignments—she was returning home after completing training. *See Memorandum in Opposition to Motion for Summary Judgment, at 2-3.*

Based on the affidavits submitted by the Defendant, it is undisputed that Martinez was participating in training or duty pursuant to 32 U.S.C. § 502. Participating in the training session required Martinez to travel from her home in southern Idaho to participate with her National Guard unit in exercises held in Lewiston, Idaho. There is no Idaho case law directly on point which addresses how duty is defined for purposes of I.C. § 6-904(4). However, this code section refers to the United States Code to explain National Guard training or duties. The United States Code also defines “active duty for training.”

(22) The term “active duty for training” means--

(A) full-time duty in the Armed Forces performed by Reserves for training purposes;

(B) full-time duty for training purposes performed as a commissioned officer of the Reserve Corps of the Public Health Service (i) on or after July 29, 1945, or (ii) before that date under circumstances affording entitlement to “full military benefits”, or (iii) at any time, for the purposes of chapter 13 of this title;

(C) in the case of members of the Army National Guard or Air National Guard of any State, full-time duty under section 316, 502, 503, 504, or 505 of title 32, or the prior corresponding provisions of law;

(D) duty performed by a member of a Senior Reserve Officers' Training Corps program when ordered to such duty for the purpose of training or a

practice cruise under chapter 103 of title 10 for a period of not less than four weeks and which must be completed by the member before the member is commissioned; and  
(E) authorized travel to or from such duty.

38 U.S.C. § 101(22). The “active duty for training” definition refers to training pursuant to 32 U.S.C. 502, and further, includes “authorized travel to or from such duty” as part of active duty for training.

SSG Rice’s affidavit which states Martinez was on duty from 12:00 a.m. January 6, 2007 to 11:59 p.m. on January 7, 2007, is consistent with the definition of “active duty for training,” as set forth in 38 U.S.C. § 101(22)). Based upon these statutory provisions, traveling to or from duty is considered active duty for training. I.C. § 6-904(4) provides immunity for any claim arising out of activities of the Idaho National Guard, based upon training or duty as defined by specific sections of the United States Code.

Based upon the undisputed facts of this case, Martinez was on duty until 11:59 p.m., and following orders of a superior by providing transportation to a fellow guardsman. While the Plaintiff suggests that the Defendant was simply traveling on her own, and had been dismissed from drills so that she was no longer on duty, these claims are speculative and not supported by affidavit. Based upon the definition of active duty for training, and the affidavits submitted in this case, Martinez was on duty at the time of the collision. Thus, I.C. § 6-904(4) is applicable, and Martinez is immune from liability for any negligent actions which resulted in the collision with Teurlings.

#### **b. Coming and Going Rule**

Teurlings contends that Martinez was not within the course and scope of her duty with the Idaho National Guard when she was traveling home after being released from

drill for the weekend. Teurlings argument focuses on the fact that Martinez was traveling in a private vehicle, she was not required to take a specific route of travel, and she had to pay her own travel expenses.

The “coming and going” rule is typically applied in worker’s compensation cases, rather than in the context of a civil action. The rule states an employee is not within the course and scope of his employment when the employee is on his way to and from work. The rule is discussed in detail in *Finholt v. Cresto*, 143 Idaho 894, 155 P.3d 695, (2007). The *Finholt* Court also discussed two exceptions to the rule, the special errand exception, and the traveling employee exception.

Cases in Idaho have articulated the “coming and going” rule, which states that an employee is not within the course and scope of his employment on his way to and from work. *Ridgway v. Combined Ins. Companies of America*, 98 Idaho 410, 411, 565 P.2d 1367, 1368 (1977). Typically these cases have arisen in the worker's compensation area rather than in the context of a civil action. In *Bocock v. State Bd. of Educ.*, 55 Idaho 18, 37 P.2d 232 (1934), this Court found an exception from the coming and going rule for an employee who, “although not at his regular place of employment, even before or after customary working hours, is doing, is on his way home from performing, or on the way from his home to perform, some special service or errand or the discharge of some duty incidental to the nature of his employment in the interest of, or under direction of, his employer.” *Id.* at 22, 37 P.2d at 234, quoting *Scrivner v. Franklin Sch. Dist. No. 2*, 50 Idaho 77, 80, 293 P. 666, 667 (1930). The special errand exception is premised on the idea that an employee leaving his normal place of work to perform a special job for an employer is, nevertheless, still performing part of his normal job. . . .

Separately, this Court has defined an exception to the coming and going rule for traveling employees. In *Cheung v. Wasatch Electric*, 136 Idaho 895, 42 P.3d 688 (2002), we explained that “[w]hen an employee's work requires him to travel away from the employer's place of business or his normal place of work, the employee is covered by worker's compensation. This is known as the “traveling employee” rule....” *Id.* at 897, 42 P.3d at 690, citing *Ridgway v. Combined Ins. Cos. Of America*, 98 Idaho 410, 411–12, 565 P.2d 1367, 1368–69 (1977). This Court has not applied the traveling employee theory outside the worker's compensation

context where it expands employer liability. Regardless, we need not reach the question of whether to apply the traveling employee exception to tort claims, because the theory would not apply to the facts presented by this case.

The traveling employee exception applies to “[e]mployees whose work entails travel away from the employer's premises” and are required “to maintain [themselves] while traveling,” giving rise to an employer's coverage of the employee while on the trip. *Ridgway*, 98 Idaho at 412, 565 P.2d at 1369. In *Ridgway*, an Idaho employee was sent to Salt Lake City, Utah, for a two-week training seminar, and during the trip was injured while en route to pick up lunch. The Industrial Commission found the relationship between the business trip and the injury too tenuous to hold the employer liable, but the Court reversed and remanded, directing the Commission to analyze the facts under the traveling employee exception. *Id.* Certainly, travel need not always be as significant as the two-week business trip in *Ridgway* to trigger the traveling employee exception. *See Cheung*, 136 Idaho at 898, 42 P.3d at 691.

*Id.* at 898-899, 155 P.3d at 699 – 700.

In the case at hand, the special errand exception would apply to the facts presented in this case. Martinez presented affidavits which state she was transporting a fellow guardsman pursuant to orders from SSG Rice. While Teurlings has suggested that the guardsmen were simply traveling together to save expenses, Teurlings has not presented affidavits to create a genuine issue of fact.

Circumstantial evidence can create a genuine issue of material fact. *Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171 (1986). However, while reasonable inferences must be drawn in favor of the non-moving party, the non-moving party cannot rest upon mere speculation. *Crea v. FMC Corp.*, 135 Idaho 175, 179, 16 P.3d 272, 276 (2000).

*Finholt v. Cresto*, 143 Idaho at 897, 155 P.3d at 698. While Teurlings contends that the guardsmen had been released from duty, the affidavits presented in this case state that Martinez was on duty until 11:59 p.m. on January 7, 2007. In addition, Martinez presented affidavits that she was following orders by transporting a fellow guardsman



home. These orders would fall under the special errand exception of the coming and going rule.

There is no Idaho case which deals with whether traveling in order to attend a National Guard drill or training falls within the course and scope of employment with the Idaho National Guard. A similar issue was addressed in Colorado, where an individual was injured while traveling to and from training for the Civil Air Patrol.

The general rule is that an employee injured while traveling to or from work is not entitled to compensation; however, this rule is subject to exception when special circumstances bring the accident within the course of employment. *Martin K. Eby Construction Co. v. Industrial Commission*, 151 Colo. 320, 377 P.2d 745 (1963); *Comstock v. Bivens*, 78 Colo. 107, 239 P. 869 (1925). Among such special circumstances is the exception that an employer may agree, expressly or impliedly, that the employment relation shall continue during the period of coming and going. *Martin K. Eby v. Industrial Commission, supra*. Such an agreement may be inferred here. The C.A.P. commander testified that, under patrol regulations, its members are pursuing C.A.P. duties from the time they leave home to attend a meeting until they return. This testimony supports the finding of the Commission that “traveling to attend was included in the activity by necessity; the duty of claimant encompassed all of his activity from the moment of entering the aircraft to depart for the meeting, through the time of travel.”

Thus, when a claimant, at the time of his injury, is performing a duty with which he is charged as a part of his contract for service, or under the express or implied direction of his employer, he is within the course of his employment under the Workmen's Compensation Act. *Berry's Coffee Shop, Inc. v. Palomba*, 161 Colo. 369, 423 P.2d 2 (1967). Hagan's travel to the required meeting was such a duty.

*Colorado Civil Air Patrol v. Hagans*, 662 P.2d 194, 196 (Colo. App. 1983).

The case before this Court is similar in nature to the *Colorado Civil Air Patrol Case*. SSG Rice provided an unrefuted affidavit which states that Martinez was on duty until January 7, 2007, and further, following orders to transport a fellow guardsman.

Thus, in the alternative, this case falls into an exception to the coming and going rule.

Therefore, the Defendant's motion for summary judgment is granted on this alternative basis.

## **2. Motion to Intervene**

Swift Transportation Company filed a motion to intervene in this matter. Swift contends that it should be permitted to intervene on the ground that it paid Teurlings' worker's compensation benefits and is thus entitled to be subrogated to Teurlings' recovery against Martinez. Because summary judgment has been granted in favor of Martinez, the motion to intervene is moot. Therefore the motion to intervene is denied.

## **CONCLUSION**

The Defendant traveled to Lewiston, Idaho to participate in drill and training activities for the Idaho National Guard on January 6, 2007. On the return trip to her home in southern Idaho, the Defendant collided with a semi-truck that was driven by the Plaintiff. The Plaintiff was injured, and he claims the Defendant negligently caused the collision.

The Defendant moved for summary dismissal of the case, based upon an exception to liability set forth in the Idaho Tort Claims Act. *See* I.C. § 6-904(4). The Plaintiff argues that the Defendant was not on duty because the drill activities were completed and she was traveling home. It is undisputed that the Defendant was participating in drill pursuant to 32 U.S.C. § 502. This section defines training requirements that guardsmen must meet when they are not on active duty. 38 U.S.C. § 101(22) defines "active duty for training" and includes authorized travel to and from duty within the definition. Based upon these code sections, the Defendant was on duty at the

time the collision occurred. Thus, summary judgment is granted based upon the exception to liability set forth in I.C. §6-904(4).

In the alternative, the Plaintiff relies on the coming and going rule to assert that the Defendant was simply driving home after the completion of drill, and thus, not acting within the course and scope of her employment with the Idaho National Guard. Based upon the foregoing analysis, the Defendant's travel falls under an exception to the coming and going rule. Therefore, summary judgment is appropriate on this alternative basis.

Also pending before the Court is a motion to intervene filed by Swift Transportation Company. Swift paid worker's compensation benefits to Teurling as a result of the injuries he sustained in the collision. Swift's motion to intervene is premised on the argument that it is entitled to be subrogated to Teurlings' recovery against Martinez. Because summary judgment was granted in favor of Martinez, the motion to intervene is moot.

### **ORDER**

The Defendants' Motion for Summary Judgment is hereby GRANTED.  
Swift Transportation Company's Motion to Intervene is hereby DENIED.  
IT IS SO ORDERED.

Dated this 13<sup>th</sup> day of July, 2012.

  
\_\_\_\_\_  
CARL B. KERRICK – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing MEMORANDUM OPINION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND SWIFT TRANSPORTATION COMPANY'S MOTION TO INTERVENE was:

1 faxed this 13<sup>th</sup> day of July, 2012, or

       hand delivered via court basket this        day of July, 2012, or

3 mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 13<sup>th</sup> day of July, 2012, to:

Ned A. Cannon  
Smith & Cannon  
508 Eighth Street  
Lewiston, ID 83501

Sonyalee R. Nutsch  
Clements, Brown & McNichols  
P.O. Box 1510  
Lewiston, ID 83501

Andrea J. Rosholt  
Moffatt, Thomas, Barrett, Rock & Fields  
P.O. Box 829  
Boise, ID 83701

Clearwater County District Court  
FAX: 208-476-8910

PATTY O. WEEKS, CLERK

By: 

Deputy



Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
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ISB # 6189

FILED July 19, 2012 AT  
A.M. 3:06 P.M. LEWISTON, IDAHO  
BY C.B.K.  
CARL B. KERRICK

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	
	)	Case No: CV09-420
	)	
Plaintiff,	)	JUDGMENT
	)	
vs.	)	
	)	
MALLORY E. LARSON,	)	
	)	
Defendants	)	
_____	)	

THIS MATTER came before the Court on Defendant's Motion for Summary Judgment filed on April 27, 2012. The Court considered the memoranda and affidavits submitted by the parties and heard oral argument on June 12, 2012.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's cause of action herein against defendant is hereby dismissed in its entirety, with prejudice, with fees and costs to be determined in post-judgment motions

JUDGMENT

by the parties.

DATED this 19<sup>th</sup> day of July 2012.

  
\_\_\_\_\_  
CARL B. KERRICK  
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 19<sup>th</sup> day of July 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith, Cannon & Bond PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501

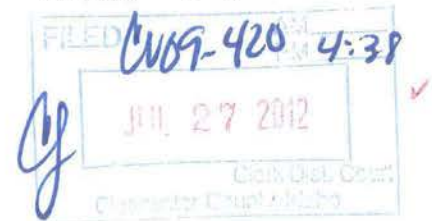
Sonyalee R. Nutsch  
Clements, Brown & McNichols, P.A.  
P. O. Box 1510  
Lewiston, ID 83501

X U.S. MAIL  
\_\_\_ HAND DELIVERED  
\_\_\_ OVERNIGHT MAIL  
\_\_\_ TELECOPY (FAX)

  
\_\_\_\_\_  
Deputy Clerk







NED A. CANNON, ISB No. 2331  
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Telephone: (208) 743-9428  
Fax: (208) 746-8421

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,  
Plaintiff,

v.

MALLORY E. LARSON,  
Defendant.

Case No.: CV 09-420

**MOTION TO RECONSIDER**

Plaintiff moves the Court to reconsider the Court's *Memorandum Opinion and Order on Defendant's Motion for Summary Judgment* entered on July 13, 2012. This motion is brought pursuant to Idaho Rule of Civil Procedure 11(a)(2)(B) and Rule 59(e), and is supported by the records and files in this action, as well as Plaintiff's *Memorandum in Support of Motion to Reconsider*.

Oral argument is requested.

DATED this 27<sup>th</sup> day of July, 2012.



Ned A. Cannon



**CERTIFICATE OF SERVICE**

I, Ned A. Cannon, declare that, on the date indicated below, I served a true and correct copy of this *Motion to Reconsider* on Mallory Larson through her counsel via the method(s) indicated below;

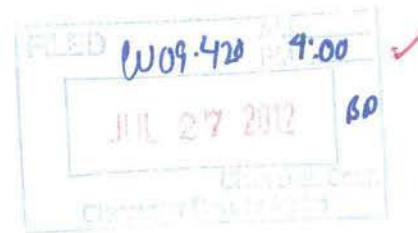
Sonyalee Nutsch  
Clements Brown & McNichols  
321 13th Street  
Lewiston, ID 83501

**Via:**

- ☐ U.S. Mail, Postage Prepaid
- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile

Signed this 27<sup>th</sup> day of July 2012, at Lewiston, Idaho.

  
Ned A. Cannon



NED A. CANNON, ISB No. 2331  
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Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendant.

Case No.: CV 09-420

**MEMORANDUM IN SUPPORT OF  
MOTION TO RECONSIDER**

**I. INTRODUCTION**

Ms. Larson's summary judgment motion can be summarized thus: So long as Ms. Larson's supervisor asks her to carpool, the Idaho legislature allegedly grants Ms. Larson blanket immunity from all liability while driving on Idaho's public roads. This position is unsupported under either Idaho law or the facts of this case.

## II. MOTION TO RECONSIDER STANDARD

Idaho Rule of Civil Procedure 11(a)(2)(B) provides that a party may move the trial court to reconsider any interlocutory order any time prior to entry of final judgment and within 14 days of entry of final judgment. A party may move the trial court for reconsideration of any final order within 14 days of entry of that order.

In Idaho, trial courts must take into consideration any new facts and any more comprehensive presentation of the law that bear on the correctness of the court's order. A party making a motion to reconsider is allowed to present new facts, but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct. App., 2006). The Idaho Supreme Court has stated the purpose of a motion to reconsider as follows:

A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact. Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be.

*J. I. Case Co. v. McDonald*, 280 P.2d 1070, 1073 (1955). Additionally, the trial court's reconsideration of the law and facts saves the parties the expense of appeal. "[A] reconsideration by the trial court will tend to reduce the number of appeals, with the attendant expense and delay." *Id.*; See *Coeur d'Alene Mining Co. v. First Nat. Bank of North Idaho*, 118 Idaho 812, 800 P.2d 1026 (1990).

Rule 59(e), covering motions to alter or amend a judgment, is similar to a motion to reconsider. Rule 59(e) affords the trial court "the opportunity to correct errors both of fact or law that had occurred in its proceedings; it thereby provides a mechanism for corrective action short of an appeal. *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (1982).

### III. DISCUSSION

**1. The Idaho legislature never explicitly exempted National Guard travel from liability while traveling to or from training or duty.**

Idaho Code § 6-904(4) states that government employees, “*while acting within the course and scope of their employment*” are not liable for any claim which “[a]rises out of the activities of the Idaho National Guard when engaged in training or duty.”<sup>1</sup> In this case, Plaintiff’s claim arises out of Ms. Larson’s negligent driving on Idaho’s public roads after she had completed her training and duty—this case does not arise out of Ms. Larson’s actions as an employee of the National Guard.

Section 6-904(4) explicitly cites title 32 of the United States Code, sections 316, 502, 503, 504, 505 or 709. While these sections mention many activities that are considered “training and duty,” the United States Congress did not see fit to include travel as part of a guardsman’s “training and duty.”

This Court cited title 38 of the United States Code. Plaintiff respectfully disagrees with the use of this title in interpreting the Idaho Tort Claims Act. Title 38 is named “Veteran’s Benefits.” The definitions section specifically cited by the Court explicitly limits the definitions to Title 38. It begins, “[f]or purposes of *this* title.”<sup>2</sup> The definition cited by the Court does not support Ms. Larson’s position.

Indeed, Title 38 supports Plaintiff’s position. The fact that “travel” to and from National Guard training is entirely absent from Title 32, but is referenced in Title 38, indicates that the United States Congress is perfectly capable of including “travel” when it is so inclined.

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<sup>1</sup> Emphasis added.

<sup>2</sup> 38 U.S.C. 101; emphasis added.

Neither the Idaho legislature nor the United States Congress has explicitly granted immunity to Ms. Larson when she is traveling to or from work on Idaho's public roads.

**2. The Idaho legislature has not included the special-errand doctrine as a condition to apply sovereign immunity.**

Section 6-904(4) fails to mention the special-errand exception cited by the Court. Section 6-904(4) explicitly lists the activities Larson could engage in and be exempt from liability (training or duty under sections 316, 502, 503, 504, 505 or 709, title 32, United States Code). Had the Idaho legislature intended to exempt from liability all National Guard members while traveling to and from their duty station on the Idaho public roads, the legislature would have certainly included such explicit language.

Neither has Ms. Larson cited any cases in Idaho where the special-errand doctrine has been applied in an action other than workers' compensation. Black's Law Dictionary defines the "special-errand doctrine" as follows: "The principle that an employee will be covered by workers' compensation for injuries occurring while the employee is on a journey or special duty for the employer away from the workplace."<sup>3</sup>

In its opinion, this Court cited *Finholt v. Cresto*, 143 Idaho 894, 155 P.3d 695 (2007). *Finholt* was a tort action. In *Finholt* the Idaho Supreme Court noted the special-errand doctrine, but did not find that it applied under the facts of the case.

In this case, Ms. Larson seeks to use the special-errand doctrine in the context of sovereign immunity. Ms. Larson has failed to cite any authority in support of the position that the special-errand doctrine extends to provide sovereign immunity for state employees when they return home from work.

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<sup>3</sup> Black's Law Dictionary, Eighth Edition.

This Court analogized this case to the Colorado Court of Appeals case *Colorado Civil Air Patrol v. Hagans*, 662 P.2d 194, 196 (Colo. App., 1983). The Colorado case cited by the Court is a workers' compensation case. The Colorado court reasoned, "Among such special circumstances is the exception that an employer may agree, expressly or impliedly, that the employment relation shall continue during the period of coming and going." The Colorado Court continued, "Thus, when a claimant, at the time of his injury, is performing a duty with which he is charged as a part of his contract for service, or under the express or implied direction of his employer, he is within the course of his employment under the Workmen's Compensation Act." *Id.*

This reasoning collapses outside of the context of workers' compensation. According to the Colorado court, an employer cannot escape liability to its employee when the employer has agreed that certain actions fall within the employment relation. In short, it is reasonable for the special-errand doctrine to apply in the context of workers' compensation.

This is not such a case. In this case, Mr. Teurlings was struck by Ms. Larson's vehicle on an Idaho public road. Mr. Teurlings had absolutely no notice that Ms. Larson's supervisor told her ("asked her"; see Ms. Larson's Insurance Statement attached as Exhibit F to the *Affidavit of Ned A. Cannon*) to carpool with another guardsman. In this case, Mr. Teurlings was not a party to any agreement between Ms. Larson and her employer. It is legal error to apply workers' compensation law to the facts of this case.

3. **Construing the facts in the record in Mr. Teurlings' favor, it is reasonable to infer that Ms. Larson was not acting within the "course and scope" of her employment.**

This Court stated in its Memorandum Opinion that "[b]ased upon the undisputed facts of this case, Martinez was on duty until 11:59 p.m., and following orders of a superior by providing

transportation to a fellow guardsman.”<sup>4</sup> This Court stated, “While the Plaintiff suggests that the Defendant was simply traveling on her own, and had been dismissed from drills so that she was no longer on duty, these claims are speculative and not supported by affidavit.”<sup>5</sup> Plaintiff respectfully disagrees with the Court’s interpretation of the record. Again, among other things, see Ms. Larson’s Insurance Statement attached as Exhibit F to the *Affidavit of Ned A. Cannon*.

Ms. Larson’s self-serving claim that she was “on duty” until 11:59 p.m. is rebutted by the fact that she was returning to her home *after* training had completed. Ms. Larson claims that she was “asked” by a superior to give a ride to a fellow guardsman. The facts of this case show that the “request” was nothing more than carpooling for the sake of convenience. Consider the following facts submitted in the Affidavit of Ned A. Cannon:

- In Exhibit F, Ms. Larson states that she was “asked” by her commander and sergeant to transport her friend, Danielle. Later in an affidavit, she used the word “ordered”.
- Ms. Larson was not reimbursed for her mileage for her travel to and from National Guard training.
- Ms. Larson and the passenger, she was allegedly “ordered” to transport, split the costs of the transportation.
- Ms. Larson and her passenger lived in the same general area.
- Ms. Larson has submitted no evidence that the National Guard directed her route home from Lewiston to Boise.
- Ms. Larson was driving her own vehicle home after completing her monthly training duty.
- Ms. Larson has submitted no evidence that the National Guard provided her a car, approved of the car she was using, or performed any inspections of the car she was using on the day of the accident.
- The National Guard did not control Ms. Larson’s conduct at the time of the accident. She was free to take any route on her return trip home.

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<sup>4</sup> Memorandum Opinion, p.8.

<sup>5</sup> Memorandum Opinion, p.8.

- Ms. Larson has submitted no evidence that she was hired by the National Guard to drive or transport other guardsmen.
- Ms. Larson has submitted no evidence that the National Guard provided her training on safe travel from Boise to Lewiston and home again.
- At the time of the accident, Ms. Larson was not driving between assignments. She was returning home after completing training.

Noticeably absent from the record is any indication as to how Ms. Larson's passenger first arrived at the weekend training session. Did Ms. Larson give the passenger a ride to the training? If so, was she "asked" or "ordered" to do so? Plaintiff has moved under Rule 56(f) for an opportunity to seek further evidence regarding Ms. Larson's "travel" if the Court is inclined to include "travel" as part of Ms. Larson's training and duty.

In Idaho, as noted above, a party making a motion to reconsider is allowed to present new facts, but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct. App., 2006). In this case, Plaintiff respectfully petitions the Court to revisit the record and draw all reasonable inferences in his favor. In this case, it is more than reasonable that Ms. Larson had completed her "training and duty" with the National Guard and was simply commuting home from work. Plaintiff respectfully submits that it is unprecedented for government employees to receive the benefits of sovereign immunity while commuting to work on public roads, at their own expense, in their own vehicles.

#### IV. CONCLUSION

Ms. Larson's argument that she was acting within the scope of employment can be summarized as follows: Ms. Larson's supervisor allegedly "asked" that Ms. Larson and another National Guard member carpool. Plaintiff respectfully petitions the Court to reconsider the law and facts of this case and deny Defendant's summary judgment motion.



DATED this 27<sup>th</sup> day of July, 2012.



Ned A. Cannon

**CERTIFICATE OF SERVICE**

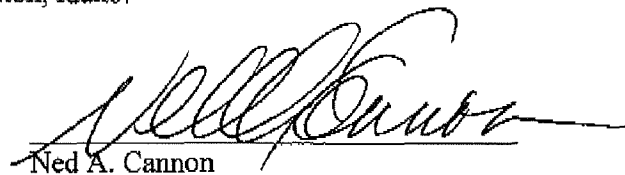
I, Ned A. Cannon, declare that, on the date indicated below, I served a true and correct copy of this *Memorandum in Support of Motion to Reconsider* on Mallory Larson through her counsel via the method(s) indicated below:

Sonyalee Nutsch  
Clements Brown & McNichols  
321 13th Street  
Lewiston, ID 83501

**Via:**

- ☐ U.S. Mail, Postage Prepaid
- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile

Signed this 27<sup>th</sup> day of July 2012, at Lewiston, Idaho.



Ned A. Cannon

CV 09-420 4:52  
AUG 01 2012 RDO

NED A. CANNON, ISB No. 2331  
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Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendant.

Case No.: CV 09-420

**MOTION TO ALTER OR AMEND  
JUDGMENT**

Plaintiff moves this Court to alter or amend its Judgment filed herein on July 19, 2012, under and pursuant to I.R.C.P. Rule 59(e). This motion is a companion motion to Plaintiff's *Motion to Reconsider* which was filed on July 27, 2012. The said motions are supported by the files and records herein, and Plaintiff's supporting memorandum.

Oral argument is requested.

DATED this 31<sup>st</sup> day of July, 2012.



---

Ned A. Cannon

**CERTIFICATE OF SERVICE**

I, Ned A. Cannon, declare that, on the date indicated below, I served a true and correct copy of this *Motion to Reconsider* on Mallory Larson through her counsel via the method(s) indicated below:

Sonyalee Nutsch  
Clements Brown & McNichols  
321 13th Street  
Lewiston, ID 83501

**Via:**

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile

Signed this 31<sup>st</sup> day of July 2012, at Lewiston, Idaho.

  
Ned A. Cannon

CV 09-420 4:52 /  
AUG 01 70

NED A. CANNON, ISB No. 2331  
SMITH & CANNON PLLC  
508 Eighth Street  
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Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendant.

Case No.: CV 09-420


**NOTICE OF HEARING**

TO: Mallory E. Larson

AND TO: Sonyalee R. Nutsch, attorney of record.

NOTICE IS HEREBY GIVEN that Plaintiff's *Motion to Alter or Amend Judgment* will be heard at the Nez Perce County Courthouse before the Honorable Carl B. Kerrick on Tuesday, August 21, 2012, at 9:00 a.m. or as soon thereafter as counsel may be heard.

DATED this 31<sup>st</sup> day of July, 2012.

  
Ned A. Cannon

**CERTIFICATE OF SERVICE**

I, Ned A. Cannon, declare that, on the date indicated below, I served a true and correct copy of this *Notice of Hearing* on Mallory Larson through her counsel via the method(s) indicated below:

Sonyalee Nutsch  
Clements Brown & McNichols  
321 13th Street  
Lewiston, ID 83501

**Via:**

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile

Signed this 31<sup>st</sup> day of July 2012, at Lewiston, Idaho.

  
Ned A. Cannon



NED A. CANNON, ISB No. 2331  
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Lewiston, Idaho 83501  
Telephone: (208) 743-9428  
Fax: (208) 746-8421

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,  
Plaintiff,

v.

MALLORY E. LARSON,  
Defendants.

Case No.: CV 09-00420

**SUPPLEMENTAL AFFIDAVIT OF SSG  
TONY RICE**

STATE OF IDAHO            )  
                                  ) ss:  
COUNTY OF NEZ PERCE )

SSG Tony Rice, being first duly sworn on oath, deposes and says:

I am over the age of eighteen years, competent to testify in court, and make this supplemental Affidavit based upon my personal knowledge.

As referenced in the Report of Investigations attached as Exhibit A to my April 26, 2012, affidavit, SPC Mallory E. Larson ("Larson") was released early from the Idaho National Guard duty station at Lewiston, Idaho on January 7, 2007. On such day, Larson was involved in a

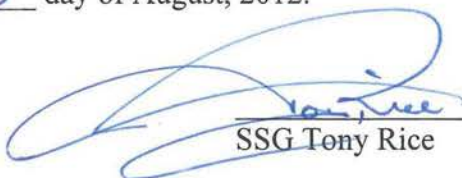


vehicle collision while commuting to her home. I understood that her passenger, another national guardsman, helped pay for Larson's travel expenses.

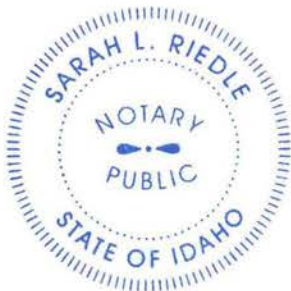
If an Idaho National Guard soldier, such as Larson, is on active weekend duty and is transporting personnel or materials for or upon order of her commander(s), she would be provided a government vehicle, with fuel, food, and lodging. The army pays the guardsmen's room and board while at their duty station if they live outside the commuting distance of 50 miles, but commuting to and from such duty station is at the sole option, responsibility and expense of said commuters.


Although I asked Larson to provide transportation for her passenger, PV2 Danielle Poe, and they were released from weekend duty station early on January 7, 2007, it does not alter the fact that commuting to and from their duty station in Lewiston, was solely at these guardsmen's option, responsibility, and expense.

DATED: This 10 day of August, 2012.

  
SSG Tony Rice

SUBSCRIBED AND SWORN to before me this 10<sup>th</sup> day of August, 2012.



  
Notary Public for Idaho  
Residing at: Lewiston  
My commission expires: 6/11/2014



**CERTIFICATE OF SERVICE**

I, Ned A. Cannon, declare that, on the date indicated below, I served a true and correct copy of this *Supplemental Affidavit of SSG Tony Rice* on Defendant through her counsel via the method indicated below:

Sonyalee Nutsch  
Clements Brown & McNichols  
321 13th Street  
Lewiston, ID 83501

**Via:**

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Email (pdf attachment)

Signed this 10<sup>th</sup> day of August, 2012, at Lewiston, Idaho.

  
Ned A. Cannon



NED A. CANNON, ISB No. 2331  
SMITH & CANNON PLLC  
508 Eighth Street  
Lewiston, ID 83501  
Telephone: (208) 743-9428  
Fax: (208) 746-8421

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendant.

Case No.: CV 09-420

**AMENDED NOTICE OF HEARING**

TO: Mallory E. Larson

AND TO: Sonyalee R. Nutsch, attorney of record.

NOTICE IS HEREBY GIVEN that Plaintiff's *Motion to Reconsider* and *Motion to Alter or Amend Judgment* will be heard at the Nez Perce County Courthouse before the Honorable Carl B. Kerrick on Tuesday, August 28, 2012, at 9:00 a.m. or as soon thereafter as counsel may be heard.

DATED this 10<sup>th</sup> day of August, 2012.

  
Ned A. Cannon

**CERTIFICATE OF SERVICE**

I, Ned A. Cannon, declare that, on the date indicated below, I served a true and correct copy of this *Amended Notice of Hearing* on Mallory Larson through her counsel via the method(s) indicated below:

Sonyalee Nutsch  
Clements Brown & McNichols  
321 13th Street  
Lewiston, ID 83501

**Via:**

- ☒ U.S. Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile

Signed this 10<sup>th</sup> day of August 2012, at Lewiston, Idaho.

  
\_\_\_\_\_  
Ned A. Cannon

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189



Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	Case No: CV09-420
	)	
Plaintiff,	)	DEFENDANT'S RESPONSE IN
	)	OPPOSITION TO PLAINTIFF'S MOTION
vs.	)	TO RECONSIDER AND MOTION TO
	)	ALTER OR AMEND JUDGMENT
MALLORY E. LARSON,	)	
	)	
Defendant.	)	
_____	)	

I.

INTRODUCTION

On January 7, 2007, Mallory Martinez fka Larson ("Ms. Martinez") was on duty with the Idaho Army National Guard when she was involved in an automobile accident with William Teurlings ("plaintiff"). On January 6, 2009, plaintiff filed his Complaint in this

DEFENDANT'S RESPONSE IN  
OPPOSITION TO PLAINTIFF'S MOTION  
TO RECONSIDER AND MOTION  
TO ALTER OR AMEND JUDGMENT -1-

matter alleging one state law claim of negligence against Ms. Martinez. On April 26, 2012, because National Guard members are exempted from liability for state law claims arising out of their activities when they acting, within the course and scope of their employment, in training or under duty, Ms. Martinez filed a Motion for Summary Judgment asking the Court to dismiss plaintiff's Complaint against her in its entirety. On July 13, 2012, this Court granted Ms. Martinez's Motion and Judgment was entered against plaintiff on July 19, 2012.

On July 27, 2012, plaintiff filed a Motion to Reconsider and on August 1, 2012, plaintiff filed a Motion to Alter or Amend Judgment based on the same grounds presented in his Motion to Reconsider. Defendant submits this response in opposition to both of plaintiff's motions and hereby incorporates by reference all previous arguments, pleadings and affidavits submitted in support of Defendant's Motion for Summary Judgment filed on April 27, 2012. This response is also supported by the Affidavit of Mallory Martinez in Support of Defendant's Response in Opposition to Plaintiff's Motion to Reconsider and Motion to Alter or Amend Judgment, filed herewith.

As explained further below, because this Court correctly determined that Ms. Martinez was acting within the course and scope of her employment and in accordance to her duty or training with the National Guard at the time of the accident, plaintiff's motions should be denied.

## II.

### ARGUMENT

#### A. AT THE TIME OF THE ACCIDENT ON JANUARY 7, 2007, MS. MARTINEZ WAS ON DUTY, BEING PAID BY THE NATIONAL GUARD AND ACTING WITHIN THE COURSE AND SCOPE OF HER EMPLOYMENT WITH THE NATIONAL GUARD.

Pursuant to Idaho Code § 6-904:

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which: ... 4. Arises out of the activities of the Idaho national guard when engaged in training or duty under sections 316, 502, 503, 504, 505 or 709, title 32, United States Code.

Idaho Code § 6-904 was last amended in 1988 and was therefore in force, as stated above, on January 7, 2007. *See id.*

It is undisputed that on January 7, 2007, Ms. Martinez was traveling to Boise, Idaho from Lewiston, Idaho where she was required to attend a monthly training pursuant to 32 U.S.C.A § 502. Plaintiff argues in his Motion to Reconsider that the “Idaho legislature never explicitly exempted National Guard travel from liability while traveling to or from training or duty. (*See* Memorandum in Opposition to Motion for Summary, 5/29/2012, p. 5). Ms. Martinez produced uncontroverted evidence that at the time of the accident she was on duty acting within the course and scope of her employment. She was not “traveling to or from training or duty” but was actually on duty and acting in accordance with instructions given to her by her superior officer while she was traveling. (*See* Affidavit of SSG Tony Rice, 4/26/2012, ¶¶ 5-6). This distinction is this reason this Court properly determined that

DEFENDANT’S RESPONSE IN  
OPPOSITION TO PLAINTIFF’S MOTION  
TO RECONSIDER AND MOTION  
TO ALTER OR AMEND JUDGMENT -3-

the exemption under Idaho Code § 6-904(4) applied and granted Ms. Martinez's Motion for Summary Judgment.

Ms. Martinez's superior officer, SSG Tony Rice, explained in his affidavit that National Guard members are on duty until 11:59 p.m. on the last day of the mandatory drill. (See Affidavit of SSG Tony Rice, 4/26/2012, ¶ 5). On January 7, 2007, Ms. Martinez was on duty with the National Guard.

At the time of the accident, Ms. Martinez and the passenger she was transporting were in full uniform with their rank and military affiliation clearly displayed. (See Affidavit of Mallory E. Martinez in Support of Defendant's Response in Opposition to Plaintiff's Motion to Reconsider and Motion to Alter or Amend Judgment, 8/10/12, p. 2). Ms. Martinez rode in the ambulance with plaintiff and he would have observed her in her military uniform. *See id.*

Ms. Martinez was being paid by the National Guard when this accident occurred. (See Affidavit of Ned Cannon, 5/26/2012, Exh. F, p. 2; *see also* Rice Aff., ¶ 5). In citing *Barker v. Fischbach & Moore, Inc.*, 110 Idaho 871, 872, 719 P.2d 1131, 1132 (1986), plaintiff acknowledged that compensation of an employee while they are traveling will justify a finding that the employee is an employee acting within the course and scope of their employment. *See id.*

It is likewise undisputed that at the time of the accident, Ms. Martinez was carrying out a specific order from her superior officer to transport a fellow guardsman to

Boise. (See Rice Aff., ¶ 6; see also Martinez Aff., ¶ 6). Plaintiff argues that because the other guardsman assisted in paying the gas expense incurred while traveling to Boise that it somehow negates the fact that that Ms. Martinez was complying with her superior officer's instruction. In *Mortimer v. Riviera Apartments*, 122 Idaho 839, 840 P.2d 383 (1992), the Supreme Court of Idaho stated that "[a]n act done partly for personal reasons and partly to serve an employer is still within the scope of employment." *Id.* at 845, 840 P.2d at 389 (internal citations omitted).

Finally, the National Guard determined in its own investigation that Ms. Martinez was "in the line of duty" at the time of the accident on January 7, 2007 and paid for her medical expenses she incurred in the accident. (See Rice Aff., Exh. A; see also Affidavit of Mallory E. Martinez, 12/30/11, ¶ 8). If Ms. Martinez had not been acting in accordance duty at the time of the accident, her medical bills would not have been paid by the National Guard.

Ms. Martinez was acting within the course and scope of her employment with the Idaho National Guard and in accordance with her duty and training with the National Guard on January 7, 2007 when this accident occurred. Ms. Martinez's Motion for Summary Judgment was therefore properly granted by this Court.

#### **B. WORKER'S COMPENSATION PRICIPLES**

In plaintiff's Memorandum in Opposition to Motion for Summary Judgment, he argued that Ms. Martinez was not acting within the course and scope of her employment



with the National Guard when this accident occurred because of the application of a rule used in worker's compensation cases which "provides that an employee is ordinarily not in the course of employment when going to or coming from work." *Casey v. Sevy*, 129 Idaho 13, 17, 921 P.2d 190, 194 (Ct. App. 1996). The rule is commonly referred to as the coming and going rule. (See Memorandum in Opposition to Motion for Summary Judgment, pp. 5-6).

In response to plaintiff's argument, Ms. Martinez identified three of the numerous exceptions to the coming and going rule that applied to the facts of this case. They were the travelling employee, the special errand doctrine and an expressed or implied agreement by the employer that the employment relationship shall continue during the period of coming and going. (See Reply in Support of Motion for Summary Judgment, 6/5/12, pp. 4-9 citing *Andrews v. Les Boise Masonry, Inc.*, 127 Idaho 65, 67, 896 P.2d 973, 975 (1995); *Ridgeway v. Combined Ins. Cos. of Am.*, 98 Idaho 410, 565 P.2d 1367 (1977); *Finholdt v. Cresto*, 143 Idaho 894, 155 P.3d 695 (2007); and *Colorado Civil Air Patrol v. Hagans*, 662 P.2d 194 (1983)).

Plaintiff now argues in support of his Motion to Reconsider that the "Idaho legislature has not included the special-errand doctrine as a condition to apply sovereign immunity" and it has only been applied in worker's compensation cases. (See Memorandum in Support of Motion to Reconsider, p. 4). Although plaintiff doesn't address the other two exceptions, all three exceptions, as well as the coming and going rule to which the exceptions relate, are only relevant if the Court determines that worker's compensation principles should

be applied to tort cases within the purview of the Idaho Tort Claims Act.

In *Casey v. Sevy*, 129 Idaho 13, 17, 921 P.2d 190, 194 (1996), the Idaho Court of Appeals stated that:

In worker's compensation cases, Idaho courts have applied the "coming and going rule," which provides that an employee is ordinarily not in the course of employment when going to or coming from work.... While Idaho appellate courts have not yet applied this rule in cases involving third-party negligence actions, neighboring jurisdictions have. *See e.g., Faul v. Jelco, Inc.*, 122 Ariz. 490, 595 P.2d 1035, 1037 (Ct.App.1979); *Connell v. Carl's Air Conditioning*, 97 Nev. 436, 634 P.2d 673, 674 (1981); *Skinner v. Braum's Ice Cream Store*, 890 P.2d 922, 924 (Okla.1995); *Runyan v. Pickerd*, 86 Or.App. 542, 740 P.2d 209, 210 (1987); *Whitehead v. Variable Annuity Life Ins.*, 801 P.2d 934, 936 (Utah 1989); *Dickinson v. Edwards*, 105 Wash.2d 457, 716 P.2d 814, 819 (1986). **We see no reason not to apply the coming and going rule set forth in our worker's compensation cases to cases involving third-party negligence actions brought against employers based on a theory of respondeat superior.**

The court also discussed several exceptions to the coming and going rule. *See id.* at 18, 921 P.2d at 194.

Plaintiff is correct that the coming and going rule has never been applied by an Idaho court in the context of analyzing course and scope of employment under the Idaho Tort Claims Act. The Idaho Tort Claims Act does not contain a definition of "course and scope of employment" nor does it state anywhere in the act that worker's compensation principles should or should not be instructive when determining the issue. *See I.C. 6-901 et. seq.* However, based on *Casey*, cited *supra*, it is probable the appellate court would "see no

reason not to apply the coming and going rule” in the analysis of course and scope under the Tort Claims Act. *See Casey*, 129 Idaho at 17, 921 P.2d at 194.

The fact that we don’t have definitive law on this point in Idaho is likely why this Court found “in the alternative” that if the coming and going rule applied in this case, an exception to the rule also applied. (*See* Memorandum Opinion and Order on Defendant’s Motion for Summary Judgment, p. 13). The Court was responding to the argument raised by plaintiff that the coming and going rule applied to show that Ms. Martinez was not acting with the course and scope of her employment. If the coming and going rule applies, as originally argued by plaintiff, then the exceptions to the coming and going rule must also be addressed.

This Court only addressed one exception in its opinion but any one of the three exceptions raised by Ms. Martinez would be sufficient to defeat plaintiff’s argument and support the determination that, even under worker’s compensation principles, Ms. Martinez was acting within the course and scope of her employment and in accordance with her duty with the National Guard at the time of this accident.

### **III.**


### **CONCLUSION**

Since Idaho National Guard members, pursuant to Idaho Code § 6-904(4), cannot be held liable for state law claims arising out of their activities when they are acting within the course and scope of their employment and pursuant to duty or training, Ms.

Martinez's Motion for Summary Judgment was properly granted and plaintiff's Complaint was appropriately dismissed. Plaintiff's Motion to Reconsider and Motion to Alter or Amend the Judgment should therefore be denied

DATED this 10<sup>th</sup> day of August 2012.

CLEMENTS, BROWN & McNICHOLS, P.A.

By   
SONYALEE R. NUTSCH  
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 10<sup>th</sup> day of August 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith & Cannon PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501  
Fax: (208) 746-8421

X U.S. MAIL  
— HAND DELIVERED  
— OVERNIGHT MAIL  
— TELECOPY (FAX)

  
Sonyalee R. Nutsch

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
Post Office Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753  
ISB # 6189

Case No. CV 2009-420  
Filed 8/13 12  
at 10:08 o'clock A M  
By [Signature] Clerk  
Deputy

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	Case No: CV09-420
	)	
Plaintiff,	)	AFFIDAVIT OF MALLORY
	)	E. MARTINEZ IN SUPPORT
vs.	)	OF DEFENDANT'S RESPONSE
	)	IN OPPOSITION TO PLAINTIFF'S
MALLORY E. LARSON,	)	MOTION TO RECONSIDER AND
	)	MOTION TO ALTER OR AMEND
Defendant.	)	JUDGMENT
	)	

STATE OF IDAHO )  
 ) ss.  
County of Clearwater )

MALLORY E. MARTINEZ formerly known as MALLORY E. LARSON,  
being first duly sworn on oath, deposes and says:

1. I am an adult citizen of the United States of America, over the age of  
twenty-one (21), competent to testify as a witness, make this affidavit on personal knowledge  
AFFIDAVIT OF MALLORY E.  
MARTINEZ IN SUPPORT OF  
DEFENDANT'S RESPONSE IN  
OPPOSITION TO PLAINTIFF'S  
MOTION TO RECONSIDER AND  
MOTION TO ALTER OR AMEND  
JUDGMENT

and am the defendant in this matter.

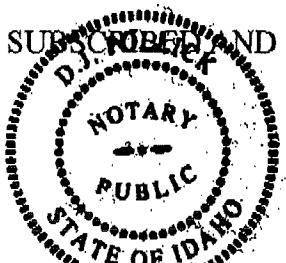
2. I am a member of the Idaho National Guard, 145<sup>th</sup> HHC Support Battalion, headquartered in Lewiston, Idaho. I have been a member of the Idaho National Guard for nine (9) years and have achieved the rank of E-5 - sergeant.

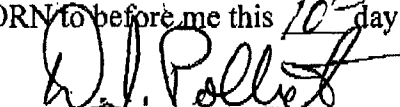
3. At the time of the accident on January 7, 2007, I was on duty with the Idaho National Guard and was acting under my superior's orders by transporting a fellow guardsman to Boise, Idaho.

4. At the time of the accident on January 7, 2007, because I was still on duty, I was in full uniform. The uniform I was wearing was a distinct military camouflage uniform and contained patches that clearly identified the military branch I was on duty with as well as my rank. My passenger was in full uniform as well. I road in the ambulance with William Teurlings, the plaintiff in this case, and spoke with him at the hospital. The entire time I communicated with Mr. Teurlings, I was in full uniform.

  
MALLORY E. MARTINEZ

SUBSCRIBED AND SWORN to before me this 10<sup>th</sup> day of August, 2012.



  
Notary Public in and for the State of Idaho  
residing at Peck, Id., therein.  
My Commission Expires: 10-6-15

AFFIDAVIT OF MALLORY E.  
MARTINEZ IN SUPPORT OF  
DEFENDANT'S RESPONSE IN  
OPPOSITION TO PLAINTIFF'S  
MOTION TO RECONSIDER AND  
MOTION TO ALTER OR AMEND  
JUDGMENT

CERTIFICATE OF SERVICE

I hereby certify that on the 10<sup>th</sup> day of August 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon  
Smith & Cannon PLLC  
508 8<sup>th</sup> Street  
Lewiston, ID 83501

X U.S. MAIL  
\_\_\_ HAND DELIVERED  
\_\_\_ OVERNIGHT MAIL  
\_\_\_ TELECOPY (FAX)

  
Sonyalee R. Nutsch

AFFIDAVIT OF MALLORY E.  
MARTINEZ IN SUPPORT OF  
DEFENDANT'S RESPONSE IN  
OPPOSITION TO PLAINTIFF'S  
MOTION TO RECONSIDER AND  
MOTION TO ALTER OR AMEND  
JUDGMENT





NED A. CANNON, ISB No. 2331  
SMITH & CANNON PLLC  
508 Eighth Street  
Lewiston, ID 83501  
Telephone: (208) 743-9428  
Fax: (208) 746-8421

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendant.

Case No.: CV 09-420

**SECOND AMENDED NOTICE OF  
HEARING**

TO: Mallory E. Larson

AND TO: Sonyalee R. Nutsch, attorney of record.

NOTICE IS HEREBY GIVEN that Plaintiff's *Motion to Reconsider* and *Motion to Alter or Amend Judgment* will be heard at the Nez Perce County Courthouse before the Honorable Carl B. Kerrick on Tuesday, September 11, 2012, at 9:00 a.m. or as soon thereafter as counsel may be heard.

DATED this 13<sup>th</sup> day of August, 2012.



Ned A. Cannon

**CERTIFICATE OF SERVICE**

I, Ned A. Cannon, declare that, on the date indicated below, I served a true and correct copy of this *Second Amended Notice of Hearing* on Mallory Larson through her counsel via the method(s) indicated below:

Sonyalee Nutsch  
Clements Brown & McNichols  
321 13th Street  
Lewiston, ID 83501

**Via:**

- ☒ U.S. Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile

Signed this 13<sup>th</sup> day of August 2012, at Lewiston, Idaho.

  
Ned A. Cannon



FILED October 4, 2012 AT  
8:58 A.M. P.M. LEWISTON, IDAHO  
BY CB  
CARL B. KENNICK

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

WILLIAM P. TEURLINGS,

Plaintiff,

v.

MALLORY E. LARSON,

Defendant.

CASE NO. CV2009-420

**MEMORANDUM OPINION  
AND ORDER ON  
PLAINTIFF'S MOTION FOR  
RECONSIDERATION AND  
MOTION TO ALTER OR  
AMEND JUDGMENT**

This matter came before the Court on the Plaintiff's Motion to Reconsider and Motion to Alter or Amend Judgment. The Plaintiff was represented by Ned Cannon, of the firm Smith and Cannon. The Defendant was represented by Sonyalee Nutsch, of the firm Clements, Brown & McNichols. The Court heard oral argument on September 11, 2012. The Court, having heard the argument of counsel and being fully advised in the matter, hereby renders its decision.

## BACKGROUND

A detailed background of this case is located within the *Memorandum Opinion and Order on Defendant's Motion for Summary Judgment and Swift Transportation Company's Motion to Intervene*, filed on July 13, 2012. The Plaintiff is seeking reconsideration of this Court's order which granted summary judgment in favor of the Defendant pursuant to the exception to liability set forth in the Idaho Tort Claims Act at I.C. § 6-904(4). In addition, if the Motion for Reconsideration is granted, the Plaintiff has filed a motion to alter or amend the judgment filed in this matter.

## MOTION FOR RECONSIDERATION STANDARD

On a motion for reconsideration pursuant to I.R.C.P. 11(a)(2)(B), the court must take into account any new facts that may affect the correctness of the prior interlocutory order. *Nationsbanc Mortgage Corp. v. Cazier*, 127 Idaho 879, 884, 908 P.2d 572, 577 (Ct. App. 1995), *citing Coeur d'Alene Mining Co. v. First Nat'l Bank of North Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990). The burden is on the moving party to bring the new facts to the court's attention; the court is not required to search the record to determine whether there are any new facts that would affect its earlier decision. *Coeur d'Alene Mining Co.*, 118 Idaho at 823, 800 P.2d at 1037. Finally, the decision to grant or deny a motion for reconsideration rests within the sound discretion of the trial court. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001).

## ANALYSIS

Summary judgment was granted on the basis that the Defendant was on duty at the time of the collision, and thus, immune from liability pursuant to an exception set

forth in the Idaho Tort Claims Act. I.C. § 6-904(4) pertains to activities of the Idaho National Guard:

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

...

4. Arises out of the activities of the Idaho national guard when engaged in training or duty under sections 316, 502, 503, 504, 505 or 709, title 32, United States Code.

*Id.* Martinez was participating in training exercises pursuant to 32 U.S.C. § 502.

(a) Under regulations to be prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, each company, battery, squadron, and detachment of the National Guard, unless excused by the Secretary concerned, shall—

(1) assemble for drill and instruction, including indoor target practice, at least 48 times each year; and

(2) participate in training at encampments, maneuvers, outdoor target practice, or other exercises, at least 15 days each year.

32 U.S.C. § 502(a)(1-2).

Martinez states she was on duty with the Idaho National Guard and attending a regularly scheduled instruction drill in Lewiston, Idaho, on the day the accident occurred.

*Affidavit of Mallory E. Martinez.* Martinez's supervisor, SSG Rice, attested that Martinez was attending drill pursuant to 32 U.S.C. § 502. *Affidavit of SSG Tony Rice*, at 2. He further stated he ordered Martinez to provide transportation to a fellow guardsman, and thus, Martinez was following orders at the time she was in the collision. SSG Rice described the time on duty and his orders to Martinez<sup>1</sup> as follows:

5. January 7, 2007, was the final day of the 145<sup>th</sup>'s regularly scheduled drill instructions in Lewiston, Idaho and SPC Mallory Larson was in attendance. SPC Larson was on duty from 12:00 a.m. on January 6, 2007 to 11:59 p.m. on January 7, 2007.

---

<sup>1</sup> Within the affidavit, SSG Rice refers to the Defendant by her maiden name, Mallory Larson.



6. I was aware that SPC Larson lived in Boise, Idaho and another guardsman who was also a member of the 145<sup>th</sup> lived in that area as well. I instructed SPC Larson to provide transportation for her fellow guardsman to and from the drill that was completed on January 7, 2007. I understood that she had complied with my order.

*Id.*

The central issue in this case is whether Martinez was on duty when the collision occurred, while she was traveling home after participating in drill activities. The Plaintiff has articulated several facts which might raise a question of material fact regarding whether the Defendant had been released from the weekend training or drill activities. However, the issue at hand surrounds the determination of whether the Defendant was on duty at the time of the collision. I.C. § 6-904(4) exempts guard members from liability when the liable act “[a]rises out of the activities of the Idaho national guard when engaged in training or duty . . .” It is undisputed on this record that the Defendant was still on duty at the time the collision occurred, no new facts have been presented which create a material issue regarding whether Martinez was on duty. Thus, the Plaintiff’s motion for reconsideration is denied.

The Plaintiff’s motion to alter or amend the judgment is contingent upon the court ruling in the Plaintiff’s favor on the motion for reconsideration. Because the motion for reconsideration is denied, the motion to alter or amend is consequently denied as well.

### **CONCLUSION**

Based upon the foregoing analysis, the Plaintiff’s motion for reconsideration is denied. Consequently, the Plaintiff’s motion to alter or amend the judgment is also denied.

**ORDER**

The Plaintiff's Motion for Reconsideration is hereby DENIED. The Plaintiff's Motion to Alter or Amend Judgment is hereby DENIED.

IT IS SO ORDERED.

Dated this 4<sup>th</sup> day of October 2012.

A handwritten signature in black ink, appearing to read 'C. B. Kerrick', written over a horizontal line.

CARL B. KERRICK – District Judge



CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing MEMORANDUM OPINION AND ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION AND MOTION TO ALTER OR AMEND JUDGMENT was:

1 faxed this 4<sup>th</sup> day of October, 2012, or

1 hand delivered via court basket this 4<sup>th</sup> day of October, 2012, or

1 mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 4<sup>th</sup> day of October, 2012, to:

Ned A. Cannon  
Smith & Cannon  
508 Eighth Street  
Lewiston, ID 83501

*- mailed*

Sonyalee R. Nutsch  
Clements, Brown & McNichols  
P.O. Box 1510  
Lewiston, ID 83501

Clearwater County District Court  
FAX: 208-476-8910

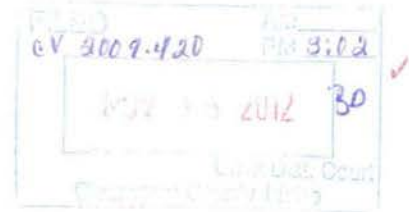
(faxed)

PATTY O. WEEKS, CLERK

By: 

Deputy





NED A. CANNON, ISB # 2331  
SMITH & CANNON PLLC  
508 Eighth Street  
Lewiston, Idaho 83501  
Telephone: (208) 743-9428  
Facsimile: (208) 746-8421

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO IN AND FOR CLEARWATER COUNTY

WILLIAM P. TEURLINGS,

Plaintiff/Appellant,

v.

MALLORY E. LARSON,

Defendant/Respondent.

Case No. CV 09-420

NOTICE OF APPEAL

TO:

The above named Respondent(s), MALLORY E. LARSON, and the party's  
attorney, Sonyalee R. Nutsch.

AND TO:

The Clerk of the above-entitled Court.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant(s), William P. Teurlings, appeals against the above  
named Respondent(s) to the Idaho Supreme Court from the following Final  
Judgment: *Memorandum Opinion and Order on Plaintiff's Motion for*

*Reconsideration and Motion to Alter or Amend Judgment*; entered in the above entitled action on the day of October 4, 2012; and *Memorandum Opinion and Order on Defendant's Motion for Summary Judgment and Swift Transportation Company's Motion to Intervene*, entered on July 13, 2012; Honorable Judge Carl B. Kerrick presiding.

2. The party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a) I.A.R.
3. A preliminary statement of the issues on appeal include, but are not limited to, the following:
  - a. Whether the trial court improperly applied Idaho's summary judgment standard by the following:
    - i. Determining that there were no genuine, material issues of fact;
    - ii. Improperly weighing the facts in the record;
    - iii. Failing to draw reasonable inferences in the non-moving party's favor; and
    - iv. Construing disputed issues of fact in the moving party's favor?
  - b. Whether genuine, material issues of fact exist as to whether Defendant was on "duty" at the time of the accident?
  - c. Whether the trial court erred as a matter of law in its interpretation and application of Idaho Code § 6-904, the Idaho Tort Claims Act?
  - d. Whether the trial court erred as a matter of law when it granted Defendant sovereign immunity for her negligence when she was driving her own vehicle on an Idaho public road after she had been dismissed from National Guard duty?
  - e. Whether the trial court erred as a matter of law in its application and interpretation of 38 U.S.C. § 101(22)?

- f. Whether the trial court erred as a matter of law in its application of Idaho's "special-errand doctrine" to the Idaho Tort Claims Act and sovereign immunity?
  - g. Whether the trial court misapplied Idaho law regarding Plaintiff's Motion to Reconsider?
  - h. Whether the trial court erred when it denied Plaintiff's Motion to Reconsider and the Affidavit of Tony Rice in support of Plaintiff's Motion to Reconsider?
  - i. Whether the trial court erred in denying Plaintiff's Motion to Strike?
  - j. Whether Plaintiff is entitled to attorney's fees and costs on appeal?
- 4. No order has been entered sealing any portion of the record.
- 5. *Reporter's Transcript*
  - a. No, a reporter's transcript is not requested.
- 6. *Clerk's Record.* Appellant requests the clerk's record automatically included under Rule 28, I.A.R., along with all other documents, affidavits, briefs and filings of record in this case.
- 7. *Exhibits.* There are no exhibits in this case.
- 8. I certify:
  - a. That a copy of this Notice of Appeal was not served on the reporter.
  - b. That the clerk of the court was not paid an estimated fee for preparation of the reporter's transcript pursuant to I.A.R. 24.
  - c. That the estimated fee for preparation of the clerk's or agency's record has been paid pursuant to I.A.R. 27.
  - d. That the appellate filing fee has been paid pursuant to I.A.R. 23.
  - e. That service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED this 15<sup>th</sup> day of November, 2012.

SMITH & CANNON PLLC



NED A. CANNON  
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 15<sup>th</sup> day of November 2012, in accordance with Idaho Rule of Civil Procedure 5(b), a true and correct copy of the foregoing document was served to the following individual(s) via the indicated method:

Sonyalee R. Nutsch  
CLEMENTS, BROWN & McNICHOLS, P.A.  
321 13th Street  
P.O. Box 1510  
Lewiston, ID 83501  
Telephone: (208) 743-6538  
Facsimile: (208) 746-0753

- ☒ U.S.P.S., first-class mail  
postage prepaid;  
☒ Fax Transmission;  
☐ Hand Delivery;  
☐ Courthouse Box;  
☐ ECF Service;  
☐ Other:

Mark C. Peterson  
Andrea Rosholt  
Moffatt Thomas  
P.O. Box 829  
Boise, ID 83701-0829

- ☒ U.S.P.S., first-class mail  
postage prepaid;  
☐ Fax Transmission;  
☐ Hand Delivery;  
☐ Courthouse Box;  
☐ ECF Service;  
☐ Other:

By: 





IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	
	)	
Plaintiff-Appellant,	)	SUPREME COURT NO.
	)	40502-2012
v.	)	
	)	CERTIFICATE TO RECORD
MALLORY E. LARSON nka	)	
MALLORY E. MARTINEZ,	)	
	)	
Defendant-Respondent.	)	
	)	

I, Barbie Deyo, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Clearwater, do hereby certify that the above foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 15<sup>TH</sup> day of November, 2012.

Dated this 10<sup>th</sup> day of December, 2012.

CARRIE BIRD, Clerk

By Barbie Deyo  
Deputy Clerk

CERTIFICATE TO RECORD



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

WILLIAM P. TEURLINGS,	)	
	)	SUPREME COURT NO.
Plaintiff-Appellant,	)	40502-2012
	)	
V.	)	CERTIFICATE OF SERVICE
	)	
MALLORY E. LARSON nka	)	
MALLORY E. MARTINEZ,	)	
	)	
Defendant-Respondent.	)	

I, Barbie Deyo, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Clearwater, do hereby certify that copies of the Clerk's Record were placed in the United States mail and addressed to Ned A. Cannon, Smith & Cannon, 508 Eighth Street, Lewiston, Idaho 83501 and Sonyalee R. Nutsch, Clements, Brown & McNichols, P.A., P.O.Box 1510, Lewiston, Idaho 83501 this 10<sup>th</sup> day of December, 2012.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 10<sup>th</sup> day of December, 2012

CARRIE BIRD, Clerk

By Barbie Deyo  
Deputy

